March 26. 79 Arg'd

Oct. 9. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 843.

THE UNITED STATES EX REL. ALEXANDER McLEOD, PLAINTIFF IN ERROR,

vs.

JOHN SHERMAN, SECRETARY OF THE TREASURY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 10, 1878.

ALEX. M'L

1

A[illegible]JRT OF THE UNITED STATES.

Clerk's office, s[illegible]

No. 843.

I, R. J. Meigs,
the writings ar[illegible]

THE UNITED STATES EX REL. ALEXANDER McLEOD, PLAINTIFF IN ERROR,

vs.

JOHN SHERMAN, SECRETARY OF THE TREASURY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Authentication of Record.*

Clerk's Certificate.

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in said office, and that said originals, together, in pursuance of stipulation, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 8th day of October, 1878.

[SEAL.] R. J. MEIGS,
Clerk.
By M. O. CLANCY,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, Chief Justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 8th day of October, 1878.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to Justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 8th day of October, 1878.

[SEAL.] R. J. MEIGS,
Clerk.
By M. O. CLANCY,
Assistant Clerk.

2 *Opening of General Term.*

Supreme court of the District of Columbia, April 15, 1878.

Proceedings before the supreme court of the District of Columbia in general term, commencing Monday, April 15, 1878. Present, Chief Justice Cartter and Justices Humphreys and MacArthur.

Adjourned till 17th instant.

3 *Petition filed April* 17, 1878.

To the honorable, the justices of the supreme court of the District of Columbia:

The petition of Alexander McLeod respectfully showeth unto your Honors:

I. That heretofore, to wit: on the 18th day of June, in the year 1869, your petitioner recovered a judgment in the circuit court of the United States for the district of South Carolina, against a certain T. C. Callicott, a supervising special agent of the Treasury Department of the United States for the sum of $\$11{,}700\frac{68}{100}$, together with the sum of $\$119\frac{36}{100}$, your petitioner's costs;

II. That afterwards, to wit; on the —— day of June, 1869, all proceedings under the said judgment was superceded and suspended by a writ of error from the Supreme Court of the United States, sued out by the said Callicott, by the order and direction of the Secretary of the Treasury of the United States, as
4 will more fully appear by reference to a printed transcript of the record in the said case, which is herewith filed and exhibited, marked exhibit A. M., No. 1, to which reference is hereby especially made.

III. That on the 17th day of February, 1871, the said writ of error was dismissed.

IV. That on the 8th day of June, 1874, the said circuit court certified in the said case that the said defendant, Callicott, was sued therein as special officer and collector under the Treasury Department, for an alleged unlawful seizure of certain bales of cotton, the property of the plaintiff, your petitioner as aforesaid, and that the actings and doings of the said defendant, Callicott, complained of in the said suit, were done and performed with probable cause, and by the direction and command of the Secretary of the Treasury, as will more fully appear by a copy of the said certificate of the said court, which is herewith filed
5 and exhibited, marked exhibit A. M., No. 2, to which reference is hereby specially made.

V. That by operation of law the said certificate wholly suspended and prevented all proceedings against the said Callicott to obtain satisfaction of the said judgment, and then and thereupon made it the duty of the Secretary of the Treasury, to pay the amount of the said judgment and costs, together with said interest on the amount of the said judgment, at and after the rate of seven *per centum per annum*, the same being the rate of

interest allowed by the law of said State of South Carolina, out of the moneys in the Treasury arising from the sale of abandoned and captured property.

VI. That on the 9th day of November, 1874, the amount due your petitioner on the said judgment was $16,319$\frac{44}{100}$; that on the day last aforesaid the Secretary of the Treasury paid to your petitioner the sum of $12,039$\frac{50}{100}$ on account of the amount
6 due on the said judgment, although there was a sufficient sum in the Treasury at the time of the said payment for the satisfaction of the said judgment and lawfully applicable thereto; that your petitioner did not accept the said sum of $12,039$\frac{50}{100}$ in satisfaction and discharge of the said judgment, but only as a partial payment thereof, your petitioner protesting at the time of the said payment, and reciting in the receipt given by him for the same that there remained due and unpaid to him on the account of the said judgment the sum of $4,279$\frac{94}{100}$, with interest as aforesaid from the day and date of said payment, which said sum, with interest as aforesaid, your petitioner hath demanded from the Honorable John Sherman, the Secretary of the Treasury, but to pay the same or any part thereof the said John Sherman hath wholly failed and refused.

Wherefore and forasmuch as your petitioner hath no
7 other remedy in the premises, he prays your Honors to grant unto him the writ of mandamus, commanding the said John Sherman, Secretary of the Treasury, to pay unto your petitioner the said sum of $4,279$\frac{94}{100}$, with interest thereon at the rate of seven *per centum per annum* from the said 9th day of November, 1874, until the same shall be paid.

PHILLIPS, MAURY & PHILLIPS,
For the Relator.

UNITED STATES OF AMERICA,
District of South Carolina.

Personally appeared before me, James B. Campbell, to me well known, and who, being duly sworn, says that of his own knowledge he knows the facts stated in the foregoing petition of Alexander McLeod to be true, except as to the demand for payment on John Sherman and his refusal to pay, which he understands and believes them to be true.

JAMES B. CAMPBELL.

Sworn to and subscribed before me, this 25th day of Feb'y, 1878.

[L. S.] J. E. H. HAGOOD,
U. S. Com.

8 *Exhibit No. 2, filed April 17, 1878.*

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In circuit court.

ALEXANDER McLEOD *vs.* T. C. CALLICOTT. } Declaration in trover, Campbell & Seabrook, Pl'ffs' Att'y.

Verdict:

Charleston, So. Ca., 31st May, 1869. We find for plaintiff eleven thousand seven hundred dollars and sixty-eight cents.

WILLIAM BAVENEL,
Foreman.

$11,700.68.

Judgment entered up 18th June, 1869. Fi. Fa. issued 5th July, 1869, for $11,700.68. Costs, $119.30.

Certificate of probable cause.

United States of America, in the circuit court of the United States, for the District of South Carolina.

ALEXANDER McLEOD *vs.* T. C. CALLICOTT, Special Agent of the Treasury Department.

9 April term, 1869. Present, his Honor the late Chief Justice Chase, presiding, and his Honor Judge Bryan.

Trial and verdict for plaintiff May 31, 1869.

My attention is called to this case, and I am requested, being the surviving member of the court by which it was tried, to certify under the act of Congress, in such cases provided, whether there was "probable cause," for the acts of the defendant on which the suit was brought, or whether he acted "under the directions of the Secretary of the Treasury" in doing the acts complained of.

I recollect the circumstances of the case, but my memory is also fortified and confirmed by the full record of the trial now before me.

The suit was an action of trespass against T. C. Callicott, a special officer and collector under the Treasury Depart-
10 ment, for the alleged unlawful seizure of certain bales of cotton, the property of the plaintiff.

The defendant pleaded the general issue and a special plea, "that said cotton was taken, and secured by him, as an officer and agent of the United States, to wit: Supervising Special Agent of the Treasury Department, in administration of the act

of March 12, 1863, providing for the collection of abandoned property, and in virtue and under color thereof.

At the trial, the Department proved that the taking and receiving of the cotton by him was under directions of the Secretary of the Treasury, which directions, in writing, were produced. That his acts in taking and receiving the cotton were subsequently approved by the Secretary of the Treasury, and that the cotton was delivered over to another agent of the Treasury, at New York, by other orders of the Secretary of the Treas-
11 ury," all which appeared by written directions and proofs.

It was clear that the acts sued on were done by directions of the Secretary of the Treasury, but it was held as matter of law that the directions and the acts were not authorized by law, and judgment against the defendant.

So far as defendant was concerned, it could not be said that, that the directions of his chief did not give him "probable cause" for his acts, there therefore was probable cause moving him to his acts, and they were by directions of the Secretary of the Treasury.

Wherefore, it is ordered that it be, and hereby is, certified unto whomsoever it may concern, that on the trial of said cause, it appeared there was probable cause moving the defendant for the acts done by him wherein the judgment was had and re-
12 covered against him in this *in this* cause; and further, that said acts were done under the direction of the Secretary of the Treasury.

Let this order be entered on the journals of this court, 8th June, 1874.

GEO. S. BRYAN,
U. S. Judge, Dist. of S. C.

In circuit court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

I, J. E. Hagood, clerk of the said court, do hereby certify that the foregoing abstract of verdict and judgment, and order of probable cause, is a true copy of the original now on file in my office in the above-stated case. And I further certify that I have examined the records, in my office, in the case, and that the postea judgment and *Fi. Fa.* is not on file in my office; but
13 that the judgdment was entered upon the 18th June, 1869, for $11,700.68, and costs for $119.30, as appears from the judgment book.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, this the 11th day of October, 1877.

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

14 *Exhibit No. 3—Filed Apl.* 17, 1878.

Supreme Court of the United States, December term, 1870.

T. C. CALLICOTT, Special Agent Treasury Dept., Plff. in Error, *vs.* ALEXANDER McLEOD. } Error to circuit court of the United States for the district of South Carolina.

Atto. Genl. 95. P. Phillips (s); J. B. Campbell (s).

1869, Nov. 20. Record received and filed.
1871, Jan. 16. Motion of Mr. Phillips to dismiss filed.
1871, Feb. 17. Adjudged to be dismissed with costs.
1872, Apl. 1. Mandate issued to F. A. Sawyer.

Test: D. W. MIDDLETON,
Clk. Supreme Court U. S.

15 *Rule to show cause issued April* 17, 1878.

In the supreme court of the District of Columbia.

UNITED STATES *ex-relatione* ALEXANDER McLEOD *vs.* JOHN SHERMAN, Secretary of the Treasury.

This day came Alexander McLeod, by his counsel, Messrs. Phillips, Maury & Phillips, and filed his petition in the name of the United States, at the relation of him the said Alexander McLeod, with the exhibits therein referred to, praying for the writ of mandamus to be directed to the Honorable John Sherman, Secretary of the Treasury of the United States, and then and thereupon moved the court to grant him a rule against the said John Sherman, Secretary as aforesaid, commanding him to show cause to the court here why the writ of mandamus should not issue against him the said John Sherman, Secretary as aforesaid, pursuant to the prayer of the said petition, and the

16 said motion was granted accordingly. Wherefore the court doth order that the said John Sherman, Secretary as aforesaid, do show cause, if any he can, to the court here on the first day of May, proximo, why the writ of mandamus should not issue against him, according to the exigency of the prayer of the said petition.

By order of the court. D. K. CARTTER,
Chief Justice.

"*Exhibit No.* 3."

Marshal's Return.

Served copy of rule to show cause, and copy of petition, on John Sherman, Secretary of the Treasury, April 17th, 1878.

F. DOUGLASS,
Marshal.

PHILLIPS, MAURY & PHILLIPS,
Attys.

17 *April* 30, 1878—*Motion to extend time granted.*

Supreme court of the District of Columbia.

UNITED STATES on the relation of ALEXANDER McLEOD, Plaintiff, *vs.* JOHN SHERMAN, Secretary of the Treasury, Deft.	At Law. No. 19426.

On motion of the defendant, by his attorney, John S. Blair, the time for him to appear and show cause is hereby enlarged and fixed for Monday, the 13th of May, 1878.

18 Filed May 13, 1878.—*Answer of John Sherman, Respondent.*

In the supreme court of the District of Columbia.

THE UNITED STATES, *ex relatione* ALEXANDER McLEOD, *vs.* JOHN SHERMAN, Secretary of the Treasury.	No. 19426.

To the honorable judges of the supreme court of the District of of Columbia:

Your respondent, John Sherman, for answer to the order of your honorable court, commanding him to show cause, if any he can, why the writ of mandamus should not issue commanding him to pay to Alexander McLeod, the relator, the sum of $4,279\frac{24}{100}$, with interest thereon, at the rate of seven per centum per annum, from the 9th day of November, 1874, until the same shall be paid, respectfully showeth:

That he is now and has been Secretary of the Treasury of the United States since the 9th day of March, 1877, by virtue of a commission from the President of the United States of that date.

He admits the statements contained in the 1st, the 2nd, the 3rd and the [redacted] paragraphs of the petition of the relator
19 to be true. He humbly conceives the 5th paragraph to be argumentative, and to contain nothing but matters of law, wherefore, in this his answer, he neither denies nor admits the same.

Your respondent denies that there was due to the relator from the United States on the 9th day of November, 1874, any greater sum than $12,039.50.

Your respondent denies that the $12,039.50 set forth in the 6th paragraph was paid to the petitioner on account of the amount due on the said judgment, but avers that it was paid as the amount due, and was intended as full payment of the amount due from the United States on the said judgment.

You respondent further showeth that on the 2d November, 1874, B. H. Bristow, Secretary of the Treasury, transmitted to

the First Auditor a certified transcript of the judgment rendered 18th June, 1869, to state an account thereon.

The First Auditor of the Treasury being absent, H. K. Leaver, chief clerk of the First Auditor's office, received, examined, and adjusted the account between the United States and Alexander McLeod, and on the 4th of November, 1874, certified a balance to be due Alexander McLeod of $12,039.50, and $119.30 to James E. Hagood, clerk, for costs, and transmitted with the vouchers and other papers in the matter the following certificate to the First Comptroller of the Treasury for his decision thereon:

No. 194511. TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, *Nov.* 4, 1874.

I hereby certify that I have examined and adjusted an account between the United States and Alexander McLeod, and find that the sum of twelve thousand one hundred and fifty-eight $\frac{80}{100}$ dollars is due from the United States to him, being the amount of the judgment in the case of Alexander McLeod *vs.* T. C. Callicot, special agent of the Treasury Department, rendered in the circuit court of the U. S. for the district of So. Carolinabia, on the 8th day of June, 1869, with the costs levied in said judgment, and interest at 7 per cent. from June 8, 1874, to November 5, 1874, inclusive, which sum is payable under the approval of the Secretary the Treasury from the appropriation "Return of proceeds of captured and abandoned property," viz:

To Alexander McLeod. Principle	$11,700 68		
Interest 151 days	$338 82		
		$12,039	50
To James E. Hagood, clerk. Costs		$119	30
		$12,158	80

As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

H. K. LEAVER,
Acting First Auditor.

To the Comptroller of the Treasury.

Both drafts to be sent to the care of James E. Hagood, clerk of the U. S. circuit court, Charleston, So. Carolina.

Afterwards, to wit: on the 4th November, 1874, the First Comptroller of the Treasury examined this account and certified to the Register of the Treasury the balance therein stated.

Afterwards, on the 6th November, 1874, J. F. Hartley, Assistant Secretary of the Treasury, under and by virtue of an appointment under the hand and official seal of the Secretary, dated Sep. 15, 1874, delegating to him authority to sign in the stead of the Secretary of the Treasury all warrants for

the disbursements from the public treasury of money, certified by the proper accounting officers of the Treasury to be due upon accounts duly audited and settled by them, which authority had not been revoked, signed a warrant, No. 2034, directing the Treasurer of the United States to pay to Alexander McLeod $12,039.50, and to James E. Haygood, clerk circuit court of South Carolina, $119.30, to be charged to the appropriation for return of proceeds of captured and abandoned property, which warrant was the same day countersigned by the First Comptroller and registered by J. A. Graham, Assistant Register.

Afterwards, to wit, on the 6th Nov., 1874, two drafts were issued by the Assistant Treasurer of the United States on the Assistant Treasurer of the United States at Charleston, S. C., No. 5035, directing him to pay to James E. Hagood, clerk circuit court of South Carolina, $119.30, which drafts were afterwards, on the same day, registered by the Register of the Treasury. The two drafts were sent to J. E. Hagood, clerk of U. S. circuit court of district of South Carolina, who, on the 7th day of
23 November, 1874, delivered draft No. 5035, for $12,039.50, to Jas. B. Campbell, survivor of Campbell and Seabrook, plaintiff's attorneys. This draft, after endorsement by Alexander McLeod, was paid by the United States Assistant Treasurer at Charleston, South Carolina, on the 4th day of November, 1874, the draft 5039 was paid by said Assistant Treasurer after endorsement by J. E. Hagood.

Whether the relator did or not receive said sum of $12,039.50 in satisfaction or discharge of said judgment, or whether he received the same merely as a partial payment thereof, or whether he protested, as set forth in his petition, at the time of payment, your respondent has no information other than that the said Jas. B. Campbell, when he received draft No. 5035, signed and delivered to J. E. Hagood, the following receipt:

In the circuit court of the United States for the district of South Carolina.

"ALEXANDER MCLEOD,
vs.
T. C. CALLICOTT, special agent of the Treasury Department.

24 Judgment June 18th, 1869.

Namely: Verdict	$11,700 68	
Costs	119 30	
		$11,819 98
Interest seven per cent. to Nov. 9, 1874, 5 years, 4 months, 22 days		4,463 36

	$16,283 34
Costs in U. S. Supreme Court	36 10
	$16,319 44
Nov. 9, 1874. Paid by United States	12,037 50
Balance due, with interest from date, till paid	4,279 94

Received, Charleston, November 9, 1874, by hands of J. E. Hagood, Esq., clerk of circuit court, district of South Carolina, from the United States Treasury, draft payable to the order of Alexander McLeod, for the sum of twelve thousand and thirty-nine $\frac{50}{100}$ dollars, in part payment of above judgment, leaving due a balance of four thousand two hundred and seventy-nine $\frac{24}{100}$ dollars, with interest from this date.

(Signed) JAS. B. CAMBPBELL,
Survivor of Campbell and Seabrook,
Plaintiff's Attys.

25 Your respondent admits that, on the 28th November, 1877, the relator, by his attorneys, did demand from your respondent, on account of said judgment, the further sum of $4,279.94, with interest from November 9, 1874; which your respondent, on the 14th January, 1878, in the following letter, refused and declined to pay:

TREASURY DEPARTMENT,
WASHINGTON, D. C., *January* 14, 1878.

Messrs. PHILLIPS, MAURY & PHILLIPS,
Attorneys for Alexander McLeod, Washington, D. C.

GENTLEMEN: I have examined your letter of November 28th last, presenting a claim in behalf of Alexander McLeod for the sum of $4,279.94, with interest from November 9th, 1874, said sum being demanded as interest remaining unpaid at that date upon a judgment, McLeod *vs.* Callicott, rendered June
26 18th, 1869; in which cause, on the 8th of June, 1874, five years after final judgment and execution, the court issued a certificate of "probable cause," under the provisions of the 12th section of the act of March 3, 1863.

After a careful inspection of the record and papers in that case, including the record and papers showing the action of this Department upon this claim of McLeod, in November, 1874, I am of the opinion that he has already been paid all that he can legally and justly claim; and that interest should not be paid by the United States upon the judgment against Callicott for the time which elapsed between the date of the judgment and the date of the certificate, at which latter date the United States first became legally responsible for the payment of the claim.

If this were not my opinion, I am forbidden by the
27 act of March 30, 1868, (Revised Statutes, Section 191,) to change or modify the balance stated upon this account by the auditing officers, and found due by them to the claimant November 5th, 1874.

Respectfully, JOHN SHERMAN,
Secretary.

Your respondent further showeth that the action in which the judgment set forth in the first paragraph of the relator's petition was rendered, was for the seizure by T. C. Callicott, special agent of the Treasury Department, of 39 bales of cotton, alleged to belong to the relator, Alexander McLeod.

The said 39 bales of cotton were shipped by said Calicott to Simeon Draper, agent of the Treasury Department at New York city, who sold the same for the sum of $4,661.21.

The expenses incurred by the said T. C. Callicott in
28 storing, transporting, insuring, weighing, and bagging said cotton, and paid out by him for the same amount to the sum of $916.25, the expenses of shipment to New York, and sale of this cotton, amounted to $587.25, and the proceeds of said sale, less these expenses, to wit: the sum of $1,503.50 were turned into the Treasury of the United States.

Your respondent admits that there was in the Treasury of the United States, on the 9th November, 1874, on the 28th November, 1877, and there is at this date a sufficient sum arising and obtained from the proceeds of sales and leases and fees collected and paid over to the Government under the two acts approved March 12, 1863, and July 2, 1864, in relation to captured and abandoned property to pay the demand of the relator; but
29 whether any portion of said moneys is as alleged by the relator lawfully applicable thereto, your respondent does not, in this his answer, either admit or deny.

Wherefore your respondent prays judgment that a mandamus shall not issue as prayed for by the relator.

JOHN SHERMAN,
Secretary of Treasury.

30 *Order dismissing Rule.*

Supreme Court of the District of Columbia, May 21, 1878.

UNITED STATES, on the relation of Alexander McLeod, *vs.* JOHN SHERMAN, Secretary of the Treasury, Defendant,	At Law, No. 19426.

Upon reading the rule made in this cause on the 17th day of April, 1878, and the answer thereto, and upon hearing Mr.

Maury, of counsel for the relator, and Mr. John S. Blair, of counsel for the defendant, it is ordered that said rule be dismissed.

31 *Motion to quash Answer, filed June* 14, 1878.

Supreme Court of the District of Columbia.

UNITED STATES *ex. rel.* Alex. McLeod
vs.
JOHN SHERMAN, Sec'y of Treasury. } No. 19426, Law.

This day comes the relator, by his counsel, and moves the court to quash the answer and return of the respondent, John Sherman, Secretary of the Treasury, and the same notwithstanding to order a peremptory writ of mandamus, to issue against the said John Sherman, Secretary of the Treasury, pursuant to the prayer of the relator's petition; and said relator prays that the same be filed *nunc pro tunc*, and it is ordered accordidgly.

32 *Stipulation, filed June* 14, 1878.

Supreme Court Dist. of Columbia.

THE UNITED STATES, *ex relatione* Alexander McLeod,
vs.
JOHN SHERMAN, Secretary of the Treasury. } No. 19426, Law.

Stipulation.

It is hereby stipulated and agreed by and between the counsel for the relator and for the respondent, respectively, in the case above entitled, as follows:

I. That in preparing the transcript of the record in the said case, in obedience to a writ of error from the Supreme Court of the United States, the clerk of the supreme court of the District of Columbia be, and he is hereby, authorized and directed to omit from the printed Exhibit A. M. No. 1 of the relator's petition, so much of the matter therein contained as begins with the word and letter "Exhibit A," on page thirteen, and ends with the initial letters "G. L. P.," on page one hundred and twenty-eight (128.)

II. That it shall be optional with the relator to have the said printed Exhibit A. M. No. 1, with the said omission, incorporated into the transcript or to file a new transcript for that purpose, omitting the part above mentioned.

III. That the respondent, John Sherman, may amend his peti-

tion by inserting the word "~~has~~ less" after the words "to wit" in line 6 of page 14 of the printed record.

PHILLIPS, MAURY & PHILLIPS,
For the Relator.
JNO. S. BLAIR,
For the Respondent.

WASHINGTON, D. C., *June*, 1878.

(Endorsed.) 19426, United States, *ex relatione* Alexander McLeod *vs.* John Sherman.

33 In the Supreme Court of the District of Columbia, the 1st day of October, 1878.

THE UNITED STATES, on the relation of Alexander McLeod, *vs.* JOHN SHERMAN, Secretary of the Treasury. | At Law, No. 19426. In Error.

Know all men by these presents, that I, Lewis D. Mowry, of Charleston, South Carolina, merchant, am bound unto the above-named John Sherman, Secretary of the Treasury, in the sum of two hundred and fifty dollars, to be paid to the said John Sherman, Secretary of the Treasury, his executors or administrators, to which payment well and truly to be made, I bind myself and my heirs, executors, and administrators firmly by these presents.

Sealed with my seal and dated this first day of October, anno Domini 1878.

34 Whereas the above-named United States, on the relation of Alexander McLeod, have prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia.

Now, therefore, the condition of this obligation is, that if the above-named, the United States, on the relation of the said Alexander McLeod, shall prosecute this said writ to effect, and answer all damages and costs—if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEWIS D. MOWRY.

Sealed and delivered in presence of—
CHARLES S. CAMPBELL.

35 The foregoing bond is approved this 9th day of October, 1878.

D. K. CARTTER,
Chief Justice.

UNITED STATES OF AMERICA,
Eastern District of S. Carolina, Fourth Circuit:

Personally appeared before me Lewis D. Mowry, who being duly sworn, says that he resides and carries on business at Charleston, So. Ca.; that he signed the above-written bond on behalf of the plaintiff in error therein named; that he is a real estate owner within the district aforesaid, and worth double the amount of said bond over and above his debts and liabilities, and exclusive of property exempt by law from attachment and execution.

LEWIS D. MOWRY.

36 Subscribed and sworn to before me at Charleston, S. C., this first day of October, A. D. 1878.

J. E. HAGOOD,
C. C. C., U. S. Dist., S. C.

I, J. E. Hagood, clerk of the circuit court of the United States for the eastern district of South Carolina, do hereby certify that Lewis D. Mowry attended and justified as surety on the foregoing bond this first day of October, 1878, and that said bond is good and sufficient within the jurisdiction of this court.

Witness my hand and seal this first day of October, 1878.

J. E. HAGOOD,
C. C. C., U. S. Dist., S. C.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chief Justice and Justices of the Supreme Court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The United States, on the relation of Alexander McLeod, and the Honorable John Sherman, Secretary of the Treasury, a manifest error hath happened, to the great damage of the said United States, &c., as by their complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the United States, this day of October, in the year of our Lord 1878, and of the Independence of the United States the one hundred and third.

[SEAL.]

R. J. MEIGS,
Clerk Sup. Court D. C.
By M. O. CLANCY,
Ass't Clerk.

DISTRICT OF COLUMBIA, *to wit:*

To Honorable John Sherman, Secretary of the Treasury.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October instant, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the District of Columbia, wherein The United States, on the relation of Alexander McLeod, is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, Chief Justice of the said Supreme Court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

(Endorsed.) Service accepted. S. F. Phillips, S. Gen'l.

38 *Exhibit No.* 1.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In circuit court.

ALEXANDER MCLEOD, Plaintiff,
Against
T. C. CALLICOT, Defendant.

Filed June 14th, 1878, under stipulation.

39 No. 1. THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

At a court of common pleas for the district of Charleston, in the State of South Carolina, begun and holden at Charleston, in the district and State aforesaid, on the third Monday in June, A. D. 1866, before the judges of said court of common pleas, the following proceedings were had:

ALEXANDER McLEOD
vs.
T. C. CALLICOT.

Be it remembered that heretofore, to wit, the first day of June, A. D. 1866, the said plaintiff, Alexander McLeod, came into court and filed the following writ against the said defendant, T. C. Callicot, in an action for damages, which writ is in the words and tenor following:

No. 2. *Writ.*

The State of South Carolina, to all and singular the Sheriffs of said State, Greeting:

40 You, and each of you, are hereby commanded, without delay, to attach the body of T. C. Callicot, wheresoever he may be found within your and each of your respective districts, so that you compel him to be and appear before the justices of the said State, at the court of common pleas, to be holden at Charleston, for the District of Charleston, on the third Monday in June next, to answer to Alexander McLeod in a plea of trespass on the case, and so forth. And also for the disposing and converting to his own use of (39) thirty-nine bales of cotton of the proper goods and chattels of the said Alexander McLeod, to the damage of said Alexander McLeod ($23,400) twenty-three thousand and four hundred dollars.

And have you this writ before the clerk of the said court at Charleston, fifteen days next before the sitting thereof.

Witness J. W. Brounfeild, Esquire, clerk of the said court at Charleston the first day of June, in the year of our Lord one thousand eight hundred and sixty-six, and in the ninetieth year of the sovereignty and independence of the United States of America.

CAMPBELL & SEABROOK,
Pltff's Atty's.

J. W. BROUNFEILD, [L. S.]
C. C. P.

41 To T. C. Callicot, Esq.

SIR: You are arrested by virtue of, or served with this writ of process, to the intent that you, by your attorney, appear at the court of common pleas in Charleston, at the next sitting thereof, being the third Monday in June next, in order to make your defence in this action. And that in case of your refusal or neglect, during the sitting of the said court, judgment may be entered against you by default.

CAMPBELL & SEABROOK,
Plaintiff's Attorneys.

No. 3. And said *writ was* returned, endorsed as follows:

No. 4. *We consent* to the removal of this case to the United States circuit court for the South Carolina circuit.

CAMPBELL & SEABROOK,
Pl'ff's Attys.

No. 5. I will *appear and* plead as if the case had originated as above.

JOHN PHILLIPS.
U. S. Dist. Atty for S. C.

27th June, 1866.

42 And upon the seventh day of November, A. D. 1866, the said Alexander McLeod, by his attorneys, Campbell & Seabrook, came into the circuit court of the United States for the district of South Carolina, and filed the following *declaration*, which declaration is in the words and of the tenor following:

No. 6. THE UNITED STATES OF AMERICA,
District of South Carolina.

In the circuit court.

T. C. Callicot, a citizen of the State of New York, was attached to answer to Alexander McLeod, a citizen of the State of South Carolina, of a plea of trespass on the case and so forth, and thereupon the said Alexander McLeod, by Campbell & Seabrook, his attorneys, complains:

For that, whereas the said plaintiff heretofore, to wit, on the day of October, anno Domini 1865, at Charleston, in the State aforesaid, was lawfully possessed, as of his own property, of certain goods and chattels, to wit: thirty bales of cotton of great value, to wit, of the value of nine thousand dollars, and being so possessed, the said plaintiff afterwards, to wit, on the day and year above-mentioned, at Charleston aforesaid, casually lost the said thirty bales of cotton out of his possession,
43 and the same afterwards, to wit, on the day and year aforesaid, at Charleston aforesaid, came to the possession of the said defendant by finding.

And, whereas, further the said plaintiff afterwards, to wit, on the day of October, in the year aforesaid, at Charleston aforesaid, was lawfully possessed, as of his own property, of other nine bales of cotton of great value, to wit, of the value of two thousand and seven hundred dollars, and being so possessed, the said plaintiff afterwards, to wit, on the day and year last above-mentioned, at Charleston aforesaid, casually lost the said nine bales of cotton, and the same afterwards, to wit, on the day and year aforesaid, at Charleston aforesaid, came to the possession of the said defendant by finding.

Yet the said defendant well knowing all the said bales of cot-

ton to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not yet delivered the said bales of cotton or any part thereof to the said plaintiff, though often requested so to do, and hath hitherto wholly refused so to do.

And afterwards, to wit, on the day and year last aforesaid, at Charleston aforesaid, converted and disposed of the said cotton to his own use.

44 Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of twenty-three thousand and four hundred dollars, and, therefore, he brings his suit, and so forth.

CAMPBELL & SEABROOK,
Plff's Attys.

And now, on the day of A. D. 186 , comes into court the said T. C. Callicot, by John Phillips, United States Attorney for the District of South Carolina, and to the declaration of the said Alexander McLeod files his plea in words and of the tenor as follows:

No. 7. T. C. CALLICOT *ads.* ALEXANDER McLEOD. } *Plea.*

And the said defendant, by John Phillips, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

JOHN PHILLIPS,
U. S. Dist. Atty for S. C.

45 No. 8. ALEXANDER McLEOD *vs.* T. C. CALLICOT. }

And the said plaintiff doth *the like.*

CAMPBELL & SEABROOK,
Plff's Atty's.

No. 9. T. C. CALLICOT *ads.* ALEXANDER McLEOD. } *Plea in bar.*

And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says:

That the said plaintiff ought not to have or maintain his aforesaid action thereof against him, the said defendant; because he says that the said cottton in the plaintiff's declaration mentioned was, to wit: on the 21st day of October, A. D. 1865, at the city of Charleston, in said district, taken and received by him, said defendant, as an officer and agent of the United States, to wit: supervising special agent of the Treasury Department, in the administration of the act entitled,

"An act to provide for the collection of abandoned prop-
46 erty, and or the provention of frauds in insurrectionary districts within the United States."

Approved March 12th, 1863, and in virtue and under color thereof.

And of this the said defendant puts himself upon the country.

D. T. CORBIN,
U. S. Att'y, Att'y for Def'd't.

In the circuit court.

UNITED STATES OF AMERICA,
South Carolina District:

No. 10. ALEXANDER McLEOD *rs.* T. C. CALLICOT. } *Replication.*

And as to the said plea of the said defendant by him secondly above pleaded, the said plaintiff saith, that he, by reason of anything by the said defendant in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant, in respect of the grievances in that plea mentioned, because he says that the said defendant, at the time when, etc., in the said declaration mentioned, of his own wrong, and without the cause by the said defendant in his
47 said second plea mentioned, did commit the said grievances in that plea mentioned, in manner and form as the said plaintiff hath above thereof complained against the said defendant, to wit: at Charleston, in the State of South Carolina, aforesaid.

And this the said plaintiff prays may be enquired of by the country, etc.

CAMPBELL & SEABROOK,
Pl'ff's Att'ys.

No. 11. And at the circuit court begun and holden at Charleston, South Carolina, for the district aforesaid, on the first Monday in April, A. D. 1869, this case came up for hearing before the Hon. Salmon P. Chase, Chief Justice, and the Hon. George S. Bryan, district judge, presiding.

And after hearing the pleadings and testimony, and other

papers submitted to the court, and argument of counsel for the plaintiff, Alexander McLeod, and argument for the defendant, T. C. Callicot, the case was submitted to the jury, under instructions of the court.

And they retired and considered the case, and returned into the court with the following verdict:

48 CHARLESTON, So. Ca.,
31*st May*, 1869.

No. 12. We find for plaintiff eleven thousand seven hundred dollars and sixty-eight cents.

$11,700$\frac{68}{100}$. WILLIAM RAVENEL,
Foreman.

Memorandum.

Before the jurors withdrew from the bar of the court here the said T. C. Callicot, by his said attorney, tendered the court here the following bill of exceptions, which was by the court here signed and sealed, and which is in form following, to wit:

Defendant's Bill of Exceptions.

In the circuit court of the United States for the district of South Carolina.

No. 13. ALEXANDER McLEOD *vs.* T. C. CALLICOT. } *April Term*, 1869.

At the trial of the cause, the plaintiff, to maintain and prove the issue on his part, gave in evidence tending to prove
49 that he was the lawful owner and in possession of thirty-nine bales of upland cotton, about the first day of October A. D. 1865, in Marlboro district, South Carolina.

That for the purpose of selling the same he forwarded it by the North Eastern railroad about the middle of October, 1865, to his factors, L. D. Mowry & Co., in Charleston, S. C.

That on its arrival at Charleston it was seized by the defendant, or his agents, as confiscable cotton, and detained by him, and finally turned over to the United States.

That the said cotton weighed about 16,400 pounds, and was worth at the time of seizure about 55 cents per pound.

And the defendant, to maintain and prove the issue on his part, gave in evidence tending to prove that he was a duly appointed supervising special agent of the Treasury Department, bearing date July 29, 1864; and subsequently, to wit, April 25, 1865, was assigned to duty at Charleston, South Carolina.

A copy of the regulations of the Treasury Department under which he was appointed was furnished him, and subsequent

orders and regulations. A copy of same was given in evidence, and is appointed and marked exhibit "A."

50 That, on the 15th day of October, A. D. 1865, a telegraphic despatch was received at the office of the defendant, in Charleston, from Florence, S. C., from Daniel Sayer, assistant agent, requesting the seizure of forty-one bales of cotton on their arrival in Charleston, ma[r]ked "A. M. L," shipped to L. D. Mowry & Co. by A. McLeod.

That defendant was absent from Charleston at the time, but Agency Aid W. J. Brown was present, and immediately had drays sent to the depot for the cotton; but, on demand, the railroad company refused to surrender the cotton unless the military forces of the United States came for it.

Thereupon Gen'l W. L. Bennett was applied to by said Brown for assistance, and a guard was sent by him to secure the cotton.

The guard proceeded to the depot, and thereupon thirty-nine bales of cotton was found and given up, and subsequently was received and stored by George W. Clark, under instructions of the defendant, and by him kept till the 30th day of May, 1866, and then, pursuant to instructions from the Secretary of the Treasury, forwarded to Simeon Draper, special agent of the Treasury Department at New York city.

51 That the plaintiff was a resident of Marlboro district, S. C., and resided there upon his plantation during the war.

In February, 1863, he sold 238 bales of cotton to the confederate government, and received confederate bonds in payment.

By the terms of sale he was to keep the cotton with due care upon his plantation, and deliver it whenever thereto requested by the confederate government.

He (the said plaintiff) retained this cotton till Gen'l Sherman's army passed through the State of South Carolina in February, A. D. 1865, when all of said cotton but about 60 bales was burned.

Subsequently the United States forces stationed at Bennettsville, in said district of Marlboro, in 1865, discovered and seized a portion of said 60 bales, being stored on plaintiff's plantation at the time in the overseer's house.

Of that remainder, 8 bales were saved by the plaintiff, mixed and repacked with some of his own which was raised in 1864, and in that way the 39 bales seized were made up.

52 In the summer of 1865 all this cotton was seized by the military commander at Bennettsville, S. C., Captain Callahan, who instituted proceedings in a provost court to determine the title to the cotton, and said court, after a hearing, released the same.

The plaintiff afterwards forwarded this cotton to Charleston,

S. C., where, by the aid of the United States forces, it was seized by Agency Aid Brown, as before stated.

The assistant agent, Sayer, reported by letter to Callicot that he was satisfied that this cotton was confederate government cotton.

Defendant, Callicot, on the 23rd day of February, 1866, reported the circumstances of the case to the Secretary of the Treasury, who replied, April 6th, 1866, that it not sufficiently appearing by the evidence that the cotton was confederate cotton, and the provost court having determined it belonged to McLeod, the cotton would be released to McLeod on his paying expenses and giving certificate of probable cause of seizure.

Defendant at once notified McLeod['s] counsel of this, and stated his readiness to release the cotton on these conditions.

No reply was received. Ten days thereafter (May 1st,
53 1866,) counsel was again notified, and replied that they declined to receive the cotton on the terms stated.

On May 5, 1866, defendant informed the Secretary of the Treasury of this refusal, and on May 12, 1866, was instructed to forward the cotton to New York unless McLeod consented to the terms proposed within 30 days, leaving McLeod to his remedy under act March 12, 1863.

Pursuant thereto the cotton was forwarded to New York.

That the official report of the defendant relative to the cotton was furnished from the records of the Treasury Department, and read without objection.

Same is appended and marked Exhibit "B."

And the testimony on both sides being closed, the defendant prayed the court to instruct the jury in the following particulars:

1. That if they find the cotton in question was arrested by the military forces of the United States in the State of South Carolina on or before the 15th day of October, 1865, as indicated by the record of the provost court held at Bennettsville, S. C., then

it became captured property under the provisions of the
54 act of March 12, 1863, entitled:

"An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States;" and, being such, it became and was the duty of the officer or soldier taking or receiving such property to turn the same over to the defendant, T. C. Callicot, the duly appointed special agent of the Treasury Department, then on duty at Charleston, S. C.; and it became and was the duty of said Callicot to take and receive the same, and no action can be maintained against him, the said Callicot, therefor.

2. That the pretended trial had in the provost court at Bennettsville, S. C., of which Captain Callahan was president, and two citizens were associates, "to determine the title to the cotton"

after the capture thereof, was without warrant or color of law and void; and the release of the cotton to the plaintiff consequent upon the finding of that court was in violation of the 10th section of the act of Congress approved July 2, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and provide for
55 the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection," and did not vest any right to the cotton in the plaintiff as against the United States; and the defendant, T. C. Callicot, in the discharge of his duty as special agent of the Treasury Department, under the acts of Congress relative to captured and abandoned property, had full right to take and receive said cotton, as he did, on its arrival at Charleston in October, 1865; and the plaintiff has no remedy in this court against him.

3. That if they find the cotton was arrested on its arrival in Charleston in October, 1865, by the military forces of the United States, or by defendant, T. C. Callicot, as special agent of the Treasury Department, with their aid and assistance, (he being unable to make such arrest without such aid,) then by virtue of this arrest the cotton became captured property, and the taking or receiving of it by the defendant in his official capacity and accounting to the Treasury Department was lawful, and no action can be maintained against him therefor in this court.

4. That if the defendant, as special agent of the Treasury
56 Department, received the cotton in question as "captured property," and reported the facts concerning the same to the Secretary of the Treasury for instructions, as appears by the records of that Department in evidence in this case, and pursuant thereto received the instructions of the Secretary, and acted substantially in accordance therewith, and finally, in accordance with the further instructions of the Secretary, forwarded said cotton to Simeon Draper, agent of the Treasury Department at New York, then this action cannot be maintained against him.

5. That if they find that eight bales of cotton of the 238 bales sold to the confederate States government, in February, 1863, for which the bonds of the said confederate government were received in payment by the plaintiff, were mixed and re-packed by the plaintiff with his own cotton, making up thereby the 39 bales in question, and the defendant has taken or received said cotton as special agent of the Treasury Department, and as such has duly accounted therefor to the United States, then the plaintiff cannot recover.

But the court rejected each and every of the instructions
57 prayed for by the defendant, and, in lieu thereof, instructed the jury in the following terms, to wit:

The district attorney has asked for various instructions, which

the court will decline to give, not that we doubt the general correctness of most of the legal propositions contained in them, but we prefer to give you what we conceive to be the law of this case in our own language, embodying the instructions asked, so far as we think them correct, in what we say.

This is an action of trespass, brought by Alexander McLeod, against T. C. Callicot.

The plaintiff alleges that thirty-nine bales of cotton belonging to him were wrongfully taken by defendant, and converted to his own use.

The defendant pleads in justification, not denying the taking, but averring that what he did was done as special supervising agent of the Treasury Department of the United States, and in accordance with law.

The plaintiff replies, denying the truth of this averment, and insisting that in what Callicot did he did not act as agent, but wrongfully and without justification in law.

58 The pleadings present the issue which you are to try: First. Did this cotton belong to Alexander McLeod, the plaintiff, in October, 1865; was it his property at that time?

And, second, was the defendant justified in what he did by virtue of his office, as supervising agent of the Treasury?

That the cotton belonged to the plaintiff, unless his title had been diverted by capture, seems not to be questioned.

The second question alone, therefore, is important.

Under several acts of Congress, during the late war, supervising agents of the Treasury Department were appointed in the several insurgent States, and charged with certain specific duties.

Among these duties was that of receiving from the military officers of the United States all property captured by them, with instructions to turn it over to the proper authorities of the United States for sale, and for account.

In respect, citizens who had maintained a loyal adhesion to the Government of the United States, it was provided by law that this property or proceeds should be returned to them upon

59 making the necessary pooofs in the Court of Claims, at any time within two years from the close of the rebellion.

It is alleged, and not denied, that Callicot was supervising agent, and had this general authority.

It was his duty to receive from the military officers, and from private soldiers, all property captured by the forces of the United States, during the recent war, within his agency.

If this case depended upon this general authority, the only question to be determined would be, whether the cotton in question was captured property.

But there is something more in this case.

These supervising agents were appointed by the Secretary of

Treasury, under regulations approved by the President of the United States, and were subject, in all respects, to his direction and control; and the general regulations established had relation only to a state of war.

Now, actual hostilities between the insurgent States and the United States terminated, practically, in May, 1865.

60 In the State of South Carolina a provisional government was organized under a proclamation of the President, in June or July of that year, and the Secretary of the Treasury, having reference to this changed condition of affairs, on the 27th of June, 1865, addressed a circular to those Treasury agents, in which he prescribed a rule for their government in the new state of things.

(The chief justice here read the fourth section of the circular.)

This section provides that officers "charged with the duty of receiving and collection, or having in their possession or under their control, captured, abandoned or confiscable personal property, will dispose of the same in accordance with regulations heretofore prescribed, and refrain from receiving such from military or naval authorities after the 30th instant."

The general regulation which required Mr. Callicot to receive all captured property from the officers of the United States was thus rescinded on the 27th of June, 1865, with the following limitation:

"This will not be considered as interfering with the operations of agents now engaged in receiving or collecting the
61 property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records delivered to the United States military or Treasury authorities by rebel military officers or cotton agents."

The new regulation or prohibitory order, therefore, did not extend to property which had been captured or surrendered by the military officers of the confederate government to the United States; but, with that exception, the prohibition is complete and final, and no agent of the Treasury Department was justified in receiving, after the 30th of June, 1865, any captured property, unless theretofore surrendered; much less was any such officer warranted in making any capture of unsurrendered cotton himself after that date, with or without military aid.

He had no authority to do so. All his powers, as we have said to you, were derived from the Treasury Department, and when the Treasury Department withdrew that general authority it was at an end.

The question, then, in this case is, whether this was part of the property which had been surrendered by the military au-
62 thorities of the confederate government to the United States prior to the 27th of June, 1865.

You have heard all the evidence, and it is your province to determine whether or not this property was in that category. If it was, then it was Callicot's duty to receive it, and transmit it to the authorities of the United States for sale; and the only remedy which the owner or claimant of the cotton could possibly have, would be by application to the Court of Claims of the United States.

The whole matters seems to be narrowed down to the simple proposition, whether the evidence before you satisfies your minds that this cotton was included in the surrender referred to in the Secretary's instructions of the 27th of June.

If it was so included, then the court charges you that neither the action of the provost court, relied upon by the defendant, nor the action of any State court, could withdraw it from that category, without the consent of the United States.

If it was, on the 27th of June, captured property in this sense, that is, property surrendered by the military authorities of
63 the confederate government to the United States, then it remained captured property, and could not be released by the action of the provost court.

That action, if intended to have this effect, was without sanction of law and of no avail.

If it was such property, it was the duty of defendant to take possession of it; if not, his seizure was unlawful.

But there is another question not necessarily determined by the character of the property, on which it is the duty of the court to make some observations.

By an act passed on the 27th of June, 1868, Congress declared the intent of the several acts relating to captured property.

Among these was the abandoned or captured property act of March 12, 1863, of which, as well as of the others, the true intent was declared to be, that the remedy given in cases of seizure by preferring claim in the Court of Claims should be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property, in virtue, "or under color of said act," from suit at common law, or any other mode of redress whatever, before any other court or
64 tribunal, other than the Court of Claims.

It will be for you to say whether the defendant, in taking this property, proceeded under color of that act.

If he was proceeding in good faith, believing himself to be warranted, as the officer of the National Government, in taking charge of the cotton under that act, we think he is covered by its provision.

We adopt this view the more readily because, in a subsequent part of the act, it is provided that "in all cases in which suits of trespass (which is this case) may have been brought, or shall

hereafter be brought against any person for or [on] account of private property taken by such person as an officer of the United States, by virtue of "any act relating to captured or abandoned property," and the defendant shall plead, or allege in bar thereof, that such act was done or omitted to be done by him as an officer of the United States, in the administration of one of the acts aforesaid, or in virtue or under color thereof, such plea or allegation, if the fact be sustained by the proof, shall be deemed and adjudged in law to be a complete and conclusive bar to any such suit or action."

65 It is our duty, under this act, to say to you that the plea of the defendant in this case is a conclusive bar to this action, if you find affirmatively that the acts of his, complained of by him in the declaration, were done by him in virtue or under color of any of the acts referred to.

If it was done by him as supervising special agent, under a mistake as to the character of this property, he is, in our judgment, protected by this act.

It would not protect the United States from a demand in the Court of Claims for this property, but it would protect the officer against a private suit, if he acted under color of this law or under a mistaken sense of law.

You have heard all the evidence, and it is for you to judge whether he acted under a sense of duty or not. You can weigh the whole evidence, and determine that matter for yourselves.

The only remaining point upon which it is proper to instruct you is this:

It is claimed by counsel that, if in the event you should find for the plaintiff, you may assess what are called vindictive damages.

66 The court cannot say that to you. If you find for the plaintiff it will be your duty to assess the value of the property at the time of the conversion, on the 21st of October, 1865, with lawful interest from that date.

To the granting of which said instructions, and to the refusal of those prayed for by the defendant, the defendant then are [and] there, and before the jury had withdrawn from the bar, did except, and, inasmuch as the matter aforesaid do not appear by the verdict of the jury, prayed the court here to sign and seal this bill of exceptions, which is accordingly done this 31st day of May, A. D. 1869.

S. P. CHASE,
Chief Justice U. S.

No. 14. And now, here, at this day, to wit, the 28th day of June, A. D, 1869, the said T. C. Callicot produced here to the said court the writ of the said United States of America, for the

correcting of errors of and upon the promises, commanding the record and proceedings aforesaid of the judgment aforesaid, so rendered as aforesaid, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to
67 be held at the city of Washington, on the first Monday in December next; which said writ of error is in the words and of the tenor following:

No. 15. The United States of America.

The President of the United States to the judges of the circuit court of the United States for the fourth circuit in and for the district of South Carolina:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Alexander McLeod, plaintiff, and T. C. Callicot, defendant, a manifest error hath happened to the great damage of the said T. C. Callicot, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
68 writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday in December, A. D. 1868.

DAN'L HORLBECK,
C. C. C. U. S., for S. C.

No. 16. I certify this writ of error is brought by direction of the Secretary of the Treasury.

D. T. CORBIN,
U. S. Dist. Att'y for South Carolina.

No. 17. I served this writ of error by lodging a copy thereof in the office of the clerk of the United States circuit court for the district of South Carolina, at Charleston, South Carolina, for the adverse party, on the 28th day of June, A. D. 1869.

E. P. BUTTS, JR.,
Gen'l Deputy U. S. Marshal.

69 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

No. 18. The United States of America to Alexander McLeod, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein T. C. Callicot is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, at the city of Charleston, in the district of South Carolina, this 29th day of June, A. D. 1869.

[L. S.] GEORGE S. BRYAN,
U. S. Judge, District of S. C.

70 DAN'L HORLBECK,
C. C. C. U. S., S. C.

No. 19. We accept service for defendant in error.

CAMPBELL & SEABROOK,
June 29, '69. *Def'ts Att'ys.*

Office of the clerk of the circuit court of the United States for the district of South Carolina.

CHARLESTON, S. C., *November* 15, 1869.

No. 21. I, Daniel Horlbeck, clerk of the circuit court of the United States for the district of South Carolina, certify that the foregoing is a true and correct transcript of the record in the case entitled "Alexander McLeod *vs.* T. C. Callicot," which is on file in my office.

Witness my hand and seal of said court, this fifteenth day of November, A. D. 1869, at Charleston, in said district.

[L. S.] DAN'L HORLBECK,
C. C. C. U. S. for S. C.

71 No. 21. EXHIBIT B.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT, *April 29th*, 1869.

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed documents contain true and cor-

rect copies of a letter from T. C. Callicot, late supervising special agent of the Treasury Department, to the Secretary of the Treasury, dated May 31, 1866, and accompanying statement, concerning a lot of cotton collected from Dr. A. McLeod, as appears from the originals on file in the Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.] WILLIAM A. RICHARDSON,
Act'g Secretary of the Treasury.

Copy.—E. S. K.

TREASURY DEPARTMENT, EIGHT AGENCY,
OFFICE OF SUPERVISING SPECIAL AGENT,
72 CHARLESTON, S. C., *May 31st*, 1866.

SIR: I have this day consigned to Simeon Draper, U. S. cotton agent, at New York, thirty-nine bales of captured cotton, lot (8th, No. 30) marked AML, collected upon information received from Ass't Agent Daniel Sayer, and claimed by Dr. Alexander McLeod.

Enclosed please find record of the case, and approved receipted bill of charges on the lot.

This is the same lot of cotton which was ordered to be released by your letter of date April 6th, 1866; but the claimant and his attorneys having neglected and refused to comply with the terms of your order within 30 days from notice thereof, the cotton is forwarded in conformity with your letter of date May 12th, 1866.

(Signed) T. C. CALLICOT,
Supervising Special Agent.

The Honorable HUGH MCCULLOCH,
Secretary of the Treasury, Washington, D. C.

Copy.—E. S. K.

Eight Agency, Treasury Department.

73 Record lot ($\frac{8}{30}$) thirty-nine bales cotton.
Marked AML.

Collected from Dr. Alexander McLeod, of Marlboro district, South Carolina, upon information received from Assistant Agent Daniel Sayer.

Shipped from Charleston, S. C., to Simeon Draper, U. S. cotton agent, New York, per steamship "Moneka," May 31, 1866. Charges, 916^{25}, as per George W. Clark's bill accompanying.

The following papers contain the record in this case:

Telegraphic dispatch dated—

FLORENCE, *October* 15, 1865.

To T. C. CALLICOT,
Sup. Spec'l Agent, Treas. Dept.:

Please collect forty-one (41) bales of cotton, marked "A.M.L," shipped to L. D. Mowry & Co. by A. McLeod, on its arrival at the station in Charleston.

I have written about it.

DANIEL SAYER,
Ass't Agent.

FLORENCE, S. C., *Oct.* 14, 1865.

T. C. CALLICOT, Esq., Sup. Spec'l Agent.

SIR: I enclose herewith the duplicate purchase list of
74 A. McLeod, of Marlboro district. I did not succeed in my efforts to examine the said McLeod upon oath in regard to his cotton, but he caused to be sent to me the enclosed affidavit.

The purchase list calls for 238 bales of cotton, but it it claimed by McLeod that all of his cotton sold to the so-called confederate government, was burned by General Sherman's army, with the exception of about 60 bales, which were delivered to Sergeant Heney, under orders of Captain A. L. Turner, of the 29th Maine volunteers, who has never made any return of it to the Government, and who is now out of the military service.

Sergeant Heney makes affidavit that he collected but 35 bales of the said cotton, and transferred it to Captain Turner.

I was informed that Captain J. E. Callighan had placed a guard over 51 bales of cotton, upon the plantation of the said McLeod, and then proceeded to adjudicate the case in the provost court, at Bennettsville, which court consisted of himself, as president, and two citizens of that town as associate justices.

The decision of the said court was, that the cotton be-
75 longed to the said A. McLeod. It has since been decided by the commanding general that this court had no jurisdiction in the case, and the opinion of the said court is entitled to no consideration whatever.

It appears, also, that the action of the McLeod was instituted for the recovery of 51 bales of cotton; and as soon as I went into the city to collect the captured property, 41 bales—which I believe was all he claimed to own—was immediately sent to Society Hill for shipment to Charleston.

Whatever disposition has been made of the ten bales deficit, is difficult to conjecture.

It has been reported to me that the said 41 bales have been shipped to Charleston, and consigned to L. D. Mowry, factor, at Charleston.

I believe that the said 41 bales of cotton rightfully belonged to

the Government, and I give this information with the hope that you will promptly seize it upon its arrival at Charleston.

It, or part of it, was shipped from Florence on the 11th instant.

Please act promptly.

Respectfully,

(Signed) DANIEL SAYER,
Ass't Ag't Tr. Dep't.

76 *Duplicate Purchase List.*

Here enter the weight of the bales only, and their marks:

238 bales, aggregate weight 108,645, @ 20, $21,729.00. C. S. A. on one end, A on the other.

STATE OF SOUTH CAROLINA,
District of Marlboro, Town or Post Office, Bennettsville:

The undersigned having sold to the confederate States of America, and received the value of the same in bonds, the receipt whereof is hereby acknowledged, 238 bales of cotton, marked and classed as in the margin, which are now deposited at his plantation, 8 miles from Bennettsville, hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same, at his own expense, at Snowden's Landing, on Peedee river, in the State of South Carolina, to the order of the Secretary of the Treasury, or his agents, or their assigns.

(Signed,) A. McLEOD.

BENNETTSVILLE, S. C., *February* 19, 1863.

77 The undersigned, as agent for the Government, certifies that the within cotton has been examined by him, or a competent judge, and that its character will rank, according to the commercial scale, as middling; and, also, that the weights and marks are as described; the cotton being in good merchantable order and safety, stored in a covered building.

The undersigned certifies that the price agreed upon is a fair market price at the present time.

(Signed) B. D. TOWNSEND,
Ass't Broker.

SOUTH CAROLINA,
Marlboro District:

Dr. Alexander McLeod came before me and made oath, that, of the two hundred and thirty-eight bales of cotton, which he sold to the so-called confederate government, a part—about 60 bales—was seized and carried away from his plantation by one Sergeant Heney, under authority from one A. L. Turner, cap-

tain and provost marshal, acting at Florence, S. C., of the United States forces, and that all the balance was burned by the United States forces which marched under General Sherman,
78 through this district in March last.

That recently Captain Callighan, commander of United States forces stationed at Bennettsville, seized all the cotton in possession of deponent, claiming same to be a part of said cotton sold by him to the so-called confederate government.

Deponent appealed to circuit provost court of said district, and the whole matter was thoroughly investigated and adjudicated there, and the record of said trial will show full proof that all the cotton so sold by him was burned and seized as aforesaid; and the verdict of the court shows that every particle he owns is his own private cotton, ginned and packed since he sold any to the said so-called confederate government.

(Signed) A. McLEOD.

Sworn to before me this October 10th, 1865.

(Signed) L. J. TOWNSEND,
Com'r in Equity.

SOUTH CAROLINA,
Marlboro District:

A. A. McQueen came before me and made oath that
79 about the 25th day of July last, after Sergeant Heney had seized and hauled off from Dr. Alexander McLeod's all the cotton belonging to the so-called confederate government on his plantation, deponent saw the wagons hauling off the same.

That said Heney told deponent that he had taken and hauled off about sixty bales of cotton from Dr. McLeod's plantation.

Deponent further saith, on oath, that Captain A. L. Turner, provost marshal for the United States at Florence, S. C., told deponent that said Sergeant Heney was acting under his orders, and was one of the officers of his company.

(Signed) A. A. McQUEEN.

Sworn to before me this October 11th, 1865.

(Signed) HENRY BOYCE,
Lieut. and Asst. Provost Marshal.

STATE OF SOUTH CAROLINA,
District of Darlington:

Personally appeared before me Charles W. Heney, who, being first duly sworn, deposes and says that he is a sergeant of
80 company "F," 29th Maine regiment U. S. volunteers.

He says that he was sent by Captain A. L. Turner, of the same regiment, to collect the Government cotton on the plantation of A. McLeod, in the district of Marlboro, South Carolina.

That upon his first visit to said plantation he was informed by

Dr. A. McLeod that the Government cotton was in his overseer's house, and that, upon looking in said house, he estimated that there were about sixty bales contained therein.

He then went to get teams to transport the said cotton to a railway station, and that duing his absence there was a considerable quantity removed, so that he could never get it.

He deposes that he only took about 35 bales of the said cotton from his plantation.

He was informed by the said A. McLeod that he had cotton which he claimed as his own in the woods.

He also avers that he believes all the cotton had in his custody had been *been* sold to the so-called Confederate States, and he bases his belief upon information derived from what he heard
81 from disinterested persons in that neighborhood.

(Signed) Serg't CHARLES W. HENEY.

Subscribed and sworn to before me this 9th day of October, 1865.

(Signed) DANIEL SAYER,,
Ass't Ag't Tr. Dep't.

To Hon. T. C. CALLICOT, Broad Street:

SIR: We beg to call your attention to the condition of forty-one (41) bales of cotton shipped by Dr. A. McLeod, of Marlboro district, to Messrs. Mowry and Company, factors in this city, per Northeastern Railroad, and seized by your order on the 21st of October last, and stored in warehouse on Vanderhorst's wharf.

Under general orders No. 59, of 5th instant, issued from headquarters department of South Carolina, Hilton Head, it appears to us that Messrs. Mowry & Co., under present circumstances, are entitled to the possession of this cotton, as we hold a certified copy of the proceedings of the circuit provost court of Marlboro district and the final decision thereon, in which the issue
82 was made between Dr. McLeod and United States, represented by Lieutenant Henry Boyce, provost marshal of Marlboro district, and counsel employed by him, whether fifty-one (51) bales of cotton seized by the United States, of which these forty-one (41) are part, were the private property of Dr. McLeod; and upon that issue, after a full hearing of two days and a half, judgment was pronounced in favor of Dr. McLeod, declaring the said cotton to be his.

By the general order referred to the provost court is declared to be the proper court for the adjudication of such questions, and its decision final, unless reversed upon appeal taken to the district commander.

Dr. McLeod was in possession of this cotton under this decision when the cotton was shipped.

The seizure was made on the 21st October.

The general order has been published for three weeks, and yet the cotton has been held all that time without any appeal from the judgment of the circuit provost court of Marlboro.

We again ask your attention to this cotton, and are ready to submit to you a certified copy of the whole proceedings
83 and an original order for the delivery of the said cotton to Dr. McLeod, based upon the judgment of the court; and also, if you require more, affidavits of Captain J. E. Callighan, president of the court, and Messrs. Hudson and Ervin, counsel for the United States, of the entire fairness of the whole proceedings, together with an affidavit of Dr. McLeod, since the seizure, that this is a part of the cotton which was in issue.

We shall await your answer, in the hope of a speedy release of this cotton, without further proceedings on our part.

(Signed) CAMPBELL & SEABROOK.

TREASURY DEPARTMENT, EIGHT AGENCY,
OFFICE OF SUPERVISING SPECIAL AGENT,
CHARLESTON, S. C., *November* 25, 1865.

MESSRS. CAMPBELL & SEABROOK.

SIRS: I have received a communication from you without date, which is not addressed to me in my official capacity, and is not signed by you as attorneys; but it is presumed that you intended to address me as a supervising special agent of the Treas-
84 ury Department, and that you wrote as attorneys for A. McLeod. In this communication you say:

"We beg to call your attention to forty-one (41) bales of cotton shipped by Dr. A. McLeod, of Marlboro district, to Messrs. Mowry and Company, factors in this city, per Northeastern Railroad, and seized by your order on the 21st of October last, and stored in warehouse on Vanderhorst's wharf."

You also call my attention to certain alleged proceedings in regard to the same cotton in a provost court, and ask me to release the same.

You are hereby informed that the whole amount of cotton actually seized by me from the said A. McLeod and now in my official possession is thirty bales, which I took and hold as captured property belonging to the United States, the same being part of a lot of 238 bales which the said McLeod sold to the late so-called Confederate State on or about the 19th day of February, 1863.

Forty-one bales were reported to me, but as yet I have only been able to seize thirty bales as aforesaid.

These thirty bales will be duly forwarded to S. Draper,
85 Esq., U. S. cotton agent at New York, with a record of all the facts in the case, so far as I may be able to ascertain them.

The act of Congress, approved March 12, 1863, provides in what manner claims against captured property are to be preferred; and the third paragraph of general orders No. 59, headquarters dep't So. Ca., being in contravention of sec. 3, of said act, has been revoked by Major General Sickels, now commanding the department of South Carolina.

This office is subordinate to the Secretary of the Treasury, and it is to the Treasury Department that you should apply, if aggrieved by my official action.

Neither provost courts, nor any other local tribunals, have any jurisdiction over the agents of the Treasury Department in the performance of their official duties.

Respectfully,

(Signed) T. C. CALLICOT,
Supervising Special Agent.

TREASURY DEPARTMENT, EIGHT AGENCY,
OFFICE OF SUPERVISING SPECIAL AGENT,
CHARLESTON, S. C., *Nov. 29th*, 1865.

86 To the AGENT OF THE NORTH EASTERN R. R.:

You will forthwith deliver to Mr. G. W. Clark, Government warehouse man, eleven (11) bales upland cotton, marked A.M.L, claimed by me as the property of the U. S. Government; otherwise their delivery will be enforced by the military authorities, at my request, for the purpose.

(Signed) T. C. CALLICOT,
Supervising Special Agent, etc.

Only nine bales were received from the R. R. Co. upon this order for eleven, making, with the 30 before collected, in all thirty-nine bales.

Considerable delay then ensued, partly owing to endeavors to recover the two bales missing, so as to forward the lot intact, and partly owing to a request, made by Mr. Campbell, the senior attorney for claimant, that final action might be deferred until after the adjournment of the legislature, at Columbia, when he desired to be heard further.

Finally, after hearing him again, on the 23d of February, the whole case was submitted to the Department, and the following correspondence ensued:

87 TREASURY DEPARTMENT, EIGHT AGENCY,
OFFICE OF SUPERVISING SPECIAL AGENT,
CHARLESTON, S. C., *February* 23, 1866.

SIR: Upon the report of Assistant Agent D. Sayer, whereof a copy is herewith enclosed, together with the original affidavit of Charles W. Heney, and the original bill of sale from A. McLeod to the so-called confederate States, of which copies are also here-

with enclosed, I have detained for investigation thirty-nine (39) bales of cotton, claimed by said McLeod, but believed to be a part of the 238 bales which he sold to the confederate States.

My first information was that there were forty-one bales of this cotton in transit to Charleston, but I only succeeded in finding and detaining thirty-nine, and these in two parcels, the first of thirty and the second of nine.

During my absence from Charleston, on an official tour through the agency, the claimant, through his attorneys, Messrs. Campbell & Seabrook, commenced proceedings against Mr. George W. Clark, the warehouse-man employed by this office, for
88 storage of Government property, and caused his arrest by the sheriff of Charleston, in an action of trover, for taking thirty bales of this cotton, and detaining the same in store, as he had done to my order.

On my return, I was indignant at this malicious and unjustifiable proceeding, and immediately applied to the general commanding, who issued an order, prohibiting the local tribunals from attempting to exercise any jurisdiction over the officers, agents or employees of the United States.

Being so indignant, I replied sharply to a note from the claimant's attorneys that the cotton in question should be forwarded to the U. S. cotton agent at New York.

While waiting, however, to recover the missing bales, in order to forward it all together, the claimant's counsel, J. B. Campbell, Esqr., has requested me to submit the case for your decision, so as to save him, if possible, from resorting to the Court of Claims, and, to guard against any prejudice that may grow out of my indignation at the arrest of Mr. Clark, I have consented to do so.

It is admitted that A. McLeod sold 238 bales of cotton
89 to the so-called Confederate States, and received the value of the same in bonds, and that he agreed to take due care of said cotton whilst on his plantation.

It is also admitted that said McLeod never delivered any part of said cotton.

He alleges that it was all destroyed by the Union forces except about 60 bales, which were taken away by one Captain Turner, of the U. S. army, acting as provost marshal at Florence.

He also alleges that the provost court at Bennettsville adjudicated upon the cotton in his possession in September last, and decided that the same did not belong to the United States, but was his private property.

It is intimated that this provost court at Bennettsville made a corrupt decision, the claimant going in with 51 bales and coming out with 41; but however that may be, its proceedings were clearly void for want of jurisdiction.

And in this opinion I am sustained by Major General Sickles,

now commanding the department of South Carolina, who
90 referred the whole matter to this office when he was appealed to by the claimant's attorneys to confirm and enforce the decision of the provost court.

As to the alleged destruction of the cotton by the Union forces, it is very remarkable, and almost incredible, that the fire should have burned exclusively the cotton which Mr. McLeod had sold to the so-called Confederate States while it left his private cotton unscathed.

If his private cotton was saved by peculiar care, then it seems to me he should bear his proportion of the loss, for, by the terms of his bill of sale, he was to take "due care" of the cotton sold until called for, and "due care," in my judgment, meant as good care as he took of his own property.

As to the sixty bales which Mr. McLeod admits were saved out of the 238 bales sold to the rebel government, his pretence that the whole of the said sixty bales were carried off by a United States military officer named Captain Turner is controverted by the affidavit of Charles W. Heney, the sergeant, who superintended the removal of whatever cotton said Turner did
91 carry off, said Heney swearing that only thirty-five bales were taken.

I strongly suspect that McLeod sold all his cotton to the so-called Confederate Government when he sold the 238 bales, and that the thirty-nine bales I now have under detention are part of the same.

Your decision is now respectfully requested, whether the whole thirty-nine (39) bales shall be forwarded to the U. S. cotton agent in New York, or whether only twenty-five (25) bales shall be so forwarded, (being the difference between the quantity which McLeod admits to have been saved, and the quantity which Heney swears Capt. Turner took,) or whether the whole shall be released.

I have written this letter somewhat hurriedly, and it is therefore more diffuse than it should and would have been if I had had time to condense it; but as Mr. Campbell, the counsel for McLeod, has gone to Washington, and desires to argue the matter with you while there, it seemed proper as he requested, that my views and information should be submitted to you as promptly as possible.

Respectfully, (Signed) T. C. CALLICOT,
Supervising Special Agent.

The Honorable HUGH MCCULLOCH,
Secretary of the Treasury.

92 TREASURY DEPARTMENT, *April 6th*, 1866.

SIR: I have received your letter of Feb'y 23d, ult., rela-

tive to thirty-nine (39) bales of cotton detained by you, which are claimed as the property of Mr. A. McLeod.

It does not appear from an investigation of the papers submitted, that the identity of the cotton in question with that subscribed to aid the late so-called Confederate States Government is sufficiently established to warrant its being held by the Government; and inasmuch as his title to said cotton appears to have been established by a military tribunal before which the whole case was fully investigated, I am disposed to give Mr. McLeod the benefit of the doubts existing in the premises.

You are accordingly hereby authorized and instructed to deliver to Mr. McLeod, the cotton in question, on the payment by him of all costs and expenses, paid or incurred on said cotton, and on his executing and delivering to you a certificate of probable cause of seizure, which will acquit and hold harmless
93 the Government and all its agents from any claim for loss or damage growing out of its seizure and detention.

Very respectfully,
(Signed) H. McCULLOCH,
Secretary of the Treasury.

T. C. CALLICOT, Esq.,
Sup'g Spec'l Agent, Charleston, S. C.

Upon receipt of this letter from the Secretary of the Treasury, dated April 6th, Messrs. Campbell & Seabrook, attorneys for A. McLeod, the claimant, were notified that the thirty-nine bales of cotton in question would be released and delivered to the claimant or his attorneys upon the terms prescribed by the Secretary.

The copy of the notice then given has been lost or mislaid, but Messrs. Campbell & Seabrook admit that they were so notified on the 19th day of April, 1866.

After waiting nearly two weeks, without receiving any reply from them, and no person appearing to take the cotton, the following letter was addressed to them:

TREASURY DEPARTMENT, EIGHT AGENCY,
OFFICE OF SUPERVISING SPECIAL AGENT,
CHARLESTON, S. C., *May* 1, 1866.

94 Messrs. CAMPBELL & SEABROOK,
Attorneys for A. McLeod.

GENTLEMEN: Immediately after the reception of instructions from the Secretary of the Treasury, dated April 6th, 1866, of which the enclosed is a copy, you were notified that the thirty-nine (39) bales of cotton marked AML, claimed by your client, Alexander McLeod, would be released upon the terms prescribed by the Secretary; but as you have not yet called for the same,

and as the delay is causing additional expenses for storage and insurance, your attention to the matter is again requested.

Please reply.

Respectfully, (Signed) T. C. CALLICOT,
Supervising Special Agent.

To the above letter Messrs. Campbell & Seabrook replied:

50 BROAD STREET,
CHARLESTON, 2 *May*, 1866.

T. C. CALLICOT, Esq.,
Supervising Special Agent, &c., &c.

SIR: We are in receipt of your favor of 1st inst., covering copy of letter from the Hon. Secretary of the Treasury,
95 under date of 6th April, 1866, instructing you to deliver to Mr. McLeod, the (39) thirty-nine bales of cotton seized by you and detained from him since October last, "upon the payment by him of all costs and expenses paid or incurred on said cotton, and on his executing and delivering to you a certificate of probable cause of seizure, which will acquit and hold harmless the Government and all its agents from any claim for loss or damage growing out of its seizure or detention."

We are also in recipt of your previous favor of 19th April, giving a similar notice, which has laid over in consequence of the absence of the writer, (Mr. Campbell,) who has been more particularly charged with this matter.

Our client resides at Darlington, and we will forward to him by mail your *your* letter, and the copy of the Secretary's.

We think it proper, however, to say, that we shall advise him not to accede to the terms upon which it is proposed to restore to him his property, or to do any more than give a simple receipt for what he shall actually receive.

Very respectfully, your obd't serv'ts,
(Signed,) CAMPBELL & SEABROOK,
Attorneys.

96 On reception of this reply from the claimant's attorneys, the supervising special agent wrote to the Secretary of the Treasury:

TREASURY DEPARTMENT,
EIGHT AGENCY OFFICE OF SUPERVISING SPECIAL AGENT,
CHARLESTON, S. C., *May* 5, 1866.

SIR: I have respectfully to request your reconsideration of my letter of February 23d, and its enclosures relating to the 39 bales of cotton detained from A. McLeod, directed to be released by your letter of April 6th, inasmuch as Messrs. Campbell & Seabrook, the attorneys for said McLeod, seemed determined to make litigation and have advised their client, the claimant, not

to comply with that condition of the release which requires the execution and delivery of "a certificate of probable cause of seizure, which will acquit and hold harmless the Government and all its agents, from any claim for loss or damage growing out of the seizure or detention of the cotton in question."

Under the circumstances, I recommend that the order for release in this case be modified or amended so as to provide that unless the claimant complies with the terms of release
97 within thirty days after notice thereof, being given to him or to his attorneys, that then, the thirty-nine bales of cotton in question shall be forwarded to the U. S. cotton agent in New York, to be disposed of according to law, and the claimant shall be left to seek his remedy for any alleged wrong under the 3d section of the act of Congress, approved March 12th, 1863.

Respectfully, (Signed) T. C. CALLICOT,
Supervising Special Agent.

The Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

To which the Secretary answered:

TREASURY DEPARTMENT, *May* 12, 1866.

SIR: I have received your letter of the 5th inst., stating that Messrs. Campbell & Seabrook, attorneys, have advised their client, Mr. A. McLeod, not to comply with that condition of release made in my letter of April 6th, which requires the execution and delivery of a certificate of probable cause; and recommending that the order of release in the case, be modified or
98 amended, so as to provide, that unless the claimant complies with its terms within thirty days, notice thereof being given to him or to his attorneys, then the thirty-nine (39) bales of cotton claimed by him, shall be forwarded to the United States cotton agent at New York, to be disposed of according to law, leaving the claimant to seek his remedy in the manner prescribed in the third section of the act of Congress approved March 12th, 1863.

Your recommendation is approved; and you will regard my letter of April 6th, above referred to, as modified accordingly, and conform your action in the premises to such modification.

In view of the importance of having such disposition made of all property in the hands of agents, that the several agencies may be closed without unnecessary delay, you will adopt the same course in reference to any other lots of property in your hands, or under your control, where the claimants hesitate or decline to accept the decision of the department in relation to their cases.

Please report your action hereunder to the Department.

Very respectfully, (Signed) H. McCULLOCH,
Secretary of the Treasury.

T. C. CALLICOT, Esq.,
Supervising Spec'l Ag't Treasury Dep't.

99 More than thirty days having elapsed since the date (April 19th) when the attorneys of the claimant were notified of the terms upon which the 39 bales of cotton in question might be released to them, to wit, forty-two days, the said cotton was therefore forwarded the United States cotton agent in New York, as first herein above stated.

(*$\frac{5th}{30}$) CHARLESTON, So., CA.,

The United States to Geo. W. Clark. *Dr.*

1865.			
Oct. 21.	To freight bill N. E. Railroad, on 30 B. C. marked AML, @ 6	$180	00
Dec. 1.	To freight bill N. E. Railroad, on 9 B. C. marked AML, @ 6	54	00
Dec. 1.	To drayage from depot to ware-house, @ 37½	14	62
1866.			
May 28.	To 8 mo.'s storage on 30 bales, @ 50c. per mo.	120	00
"	" 6 mo.'s storage on 9 bales, @ 50c. per mo.	27	00
"	" 4 mo.'s ins. on 39 bales to April 1, '66, on $200 p'r bale, @ ¾ per. cent. per mo.	214	00
May 28.	To 1 mo. ins. on 39 bales to May 1, '66, on $175 p'r bale, @ ¾ per mo.	51	18
100 May 28.	To 1 mo. ins. on 39 bales to June 1, '66, on $150 p'r bale, @ ¾ per ct.	43	87
May 28.	To labor and repairs, including bagging & rope, @ $3	117	00
May 28.	To weighing, @ 15c.	5	85
"	" shipping expenses, @ 30c.	11	70
"	" drayage from ware-house to vessel	14	63
"	" wharfage, @ 10c.	3	90
"	" marine ins. on $150 p'r bale, @ 1 per cent	58	50
		$916	25

Received of T. C. Callicot, supervising special agent, nine hundred and sixteen$\frac{25}{100}$ dollars in full for above bill.

GEO. W. CLARK.

Approved:

T. C. CALLICOT,
Supervising Special Agent.

TREASURY DEPARTMENT, EIGHT AGENCY,
OFFICE OF SUPERVISING SPECIAL AGENT,
CHARLESTON, S. C., *May 31st*, 1866.

No. 22. I certify that the above record and copies of papers included therein are correct and true.

T. C. CALLICOT,
Supervising Special Agent.

101 (Indorsed.) No. 1. Treasury Department, eight agency. Record lot (8th, No. 30) 39 bales of cotton marked AML. Collected from Dr. A. McLeod upon information received from Ass't Agent Daniel Sayer. Shipped to S. Draper, U. S. cotton agent, New York, per steamship "Moneka," May 31, 1866. Charges, $916.25, $11,700$\frac{44}{100}$, $11,701$\frac{69}{100}$.
(Indorsed.) "Exhibit B."

102 And on the 8th day of June, 1874, came into court the plaintiff Alexander McLeod, by his attorneys, Campbell & Seabrook, and obtained the following certificate of probable cause, which certificate is in the words and tenor following:

No. 23. *Certificate of Probable Cause.*

UNITED STATES OF AMERICA.

In the circuit court of the United States for the district of South Carolina.

ALEXANDER MCLEOD
vs.
T. C. CALLICOT, Special Agent of the Treasury Department. } April Term, 1869.

Present, his Honor the late Chief Justice Chase presiding, and his Honor Judge Bryan.

Trial and verdict for plaintiff, May 31, 1869.

103 My attention is called to this case, and I am requested, being the surviving member of the court by which it was tried, to certify under the acts of Congress in such cases provided whether there was "probable cause" for the acts of the defendant on which the suit was brought, or whether he acted "under the directions of the Secretary of the Treasury" in doing the acts complained of.

I well recollect the circumstances of the case, but my memory is also fortified, and confirmed by the full record of the trial now before me.

The suit was an action of trespass against T. C. Callicot, a special officer and collector under the Treasury Department, for the alleged unlawful seizure of certain bales of cotton, the property of the plaintiff.

The defendant pleaded the general issue, and a special plea that said cotton was taken and received by him, as an officer and agent of the United States, to wit: supervising special agent of the Treasury Department, in administration of the act of March 12, 1863, "providing for the collection of abandoned property, and in virtue and under color thereof."

104 At the trial the defendant proved that the taking and receiving of the cotton by him was under directions of the Secretary of the Treasury, which directions in writing were produced.

That his acts in taking and receiving the cotton were subsequently approved by the Secretary of the Treasury, and that the cotton was delivered over to another agent of the Treasury at New York by other orders of the Secretary of the Treasury; all which appeared by written directions and proofs.

It was clear that the acts sued on were done by direction of the Secretary of the Treasury, but it was held as matter of law, that the directions and the acts were not authorized by law and judgment against defendant.

So far as defendant was concerned, it could not be said that the directions of his chief did not give him "probable cause" for his acts.

There, therefore, was probable cause moving him to his acts, and they were by directions of the Secretary of the Treasury.

Wherefore, it is ordered that it be, and hereby is certified, unto whomsoever it may concern, that on the trial of said

105 cause, it appeared there was probable cause moving the defendant for the acts done by him, whereon the judgment was had and recovered against him in this cause; and further, that said acts were done "under the direction of the Secretary of the Treasury."

Let this order be entered on the journals of this court.

GEO. S. BRYAN,

8th June, 1874. *U. S. Judge Dist. of S. C.*

No. 24. UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the circuit court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true copy of the records and proceedings and of the verdict, in the case of Alexander McLeod, plaintiff, against T. C. Callicot, special agent of the Treasury Department, defendant, as appears from the original records, now remaining in my office, and from the printed exhibits taken from the record, sent up to the Supreme Court of the United States, together with all

106 things relating to the same, which are now on file. I further certify that I have examined the records in this case in my office, and the posted judgment and fi. fa. is not on file in my office, but find that the judgment was entered up on the 18th day of June, 1860, for eleven thousand seven hundred dollars and sixty-eight cents, ($11,700.68,) and costs for one hundred and nineteen dollars and thirty cents, ($119.30,) as appears from the original judgment book now in my office.

Given under my hand and the seal of the said court at clerk's office, in the city of Charleston, S. C., this the 2d day of August, A. D. 1878.

[SEAL.]

J. E. HAGOOD,
C. C. C., U. S. Dist. of S. C.

Endorsed on the cover: DIS. OF COLUMBIA, *Sup. Court:* No. 843. The United States *ex rel.* Alex. McLeod, plaintiff in error, *vs.* John Sherman, Secretary of the Treasury. Filed 10th October, 1878.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 843.

THE UNITED STATES, EX RELATIONE ALEXANDER McLEOD,

vs.

JOHN SHERMAN.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 843.

THE UNITED STATES, EX RELATIONE ALEXANDER McLEOD, vs. JOHN SHERMAN.

Fi. fa. in case of Alexander McLeod v. *T. C. Callicot.*

United States court.

THE UNITED STATES OF AMERICA,
South Carolina District:

To Louis E. Johnson, United States marshal, or any of his lawful deputies, greeting:

You, and each of you, are hereby commanded without delay, that of the goods, chattels, houses, and lands, and other hereditaments and real estates, of T. C. Callicot, you cause to be levied the sum of eleven thousand eight hundred and nineteen $\frac{28}{100}$ dollars, which Alexander McLeod, in the circuit court of the United States for the said district, lately recovered against the said T. C. Callicot for damages which he sustained, as well by reason of a certain gr'eavance then lately committed by the said T. C. Callicot to the said Alexander McLeod, as also for the sum of one hundred and nineteen $\frac{30}{100}$ dollars for his costs and charges expended in and about prosecuting his suit in that behalf, whereof the said T. C. Callicot was convicted, as appears on record.

And also, that you cause to be levied the interest upon eleven thousand seven hundred $\frac{68}{100}$ dollars, the principal of said debt, from the eighteenth day of June, in the year of our Lord one thousand eight hundred and sixty-nine (the day on which judgment is entered in this case), up to the day on which levy shall be made and satisfaction entered on this execution.

And that you have the money before the justices of the said court to be holden at Columbia, on the fourth Monday of November next, to render to the said Alexander McLeod his damages, costs, and charges aforesaid.

And have you this writ before the clerk of the said court at Columbia, according to law.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, at Charleston, the eight' day of June, in the year of our Lord one thousand eight hundred and sixty-nine, and in the ninety-third year of the sovereignty and Independence of the United States of America.

[SEAL.] DANL. HORLBECK,
C. C. C. U. S. for S. C.

CAMPBELL & SEABROOK,
Plaintiff's Attorneys.

In circuit court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing fieri

facias is a true copy of the original fieri facias in the case of Alexander McLeod vs. T. C. Callicot now on file in my office, together with the indorsements thereon.

I further certify that the judgment-book shows that the fieri facias was issued from the clerk's office on the 5th day of July, 1869, and was delivered to the marshal and entered by him as of the 5th of July, 1869, as appears from the original fieri facias.

Given under my hand and the seal of the said court at clerk's office in the city of Charleston, S. C., this the 18' day of December, A. D. 1878.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

(Indorsed:) No. roll, 384. United States of America, South Carolina district. Alexander McLeod vs. T. C. Callicot. Fi. fa. in case. Campbell & Seabrook, plaintiff's attorneys.

Entered July 5th, 1869.

L. E. JOHNSON,
U. S. Marshal,
P'r E. P. BUTTS,
Special Deputy.

5685. B. 22.

Statement.

Verdict		$11,700 68
Costs:		
Attorney	$45	
Clerk	18	
Sheriff	56 30	
		119 30
		$11,819 98

Int. 7 p'r ct. on $11,700.68 from June 15, '69, till payment.

Judg't 18 June, 1869.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, EX REL. ALEXANDER McLeod, plaintiff in error, *vs.* JOHN SHERMAN, SECRETARY OF THE TREASURY. } No. 843.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

STIPULATION.

It is hereby stipulated and agreed that the clerk of the court below has inadvertently omitted from page 22 (manuscript), after the words "*pay to,*" the following: "*Alexander McLeod,* $12,039.50, *and No.* 5036,

directing him to pay to," and from page 23 (manuscript), after the words "*on the,*" the figure one (1). But for these omissions the second paragraph on page 9 of the printed record would read, and it is hereby agreed that the court may read the said paragraph, as follows:

"Afterwards, to wit, on the 6th November, 1874, two drafts were issued by the Assistant Treasurer of the United States on the assistant treasurer of the United States at Charleston, S. C., No. 5035, directing him to pay to *Alexander McLeod* $12,039.50, *and No.* 5036, *directing him to pay to* James E. Hagood, clerk circuit court for South Carolina, $119.30, which drafts were afterwards, on the same day, registered by the Register of the Treasury.

Page 9, printed record.

"The two drafts were sent to J. E. Hagood, clerk of United States circuit court, district of South Carolina, who, on the 9th of November, 1874, delivered draft No. 5035, for $12,039.50, to James B. Campbell, survivor of Campbell and Seabrook, plaintiff's attorneys. This draft, after endorsement by Alexander McLeod, was paid by the United States assistant treasurer at Charleston, South Carolina, on the 14th day of November, 1874. The draft 5036 was paid by said assistant treasurer after endorsement of J. E. Hagood."

PHILLIPS, MAURY & PHILLIPS,
Attorneys for Plaintiff in Error.

CHAS. DEVENS,
Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1878.

NO. 843.

UNITED STATES, *ex relatione*

ALEXANDER McLEOD,

vs.

JOHN SHERMAN, SECRETARY OF THE TREASURY.

Error to the Supreme Court of the District of Columbia.

P. PHILLIPS,
WM. A. MAURY,
of Counsel for the Relator.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1878.

NO. 843.

UNITED STATES, *ex relatione*

ALEXANDER McLEOD,

vs.

JOHN SHERMAN, SECRETARY OF THE TREASURY.

Error to the Supreme Court of the District of Columbia.

Brief on the part of the relator.

This is a petition for a *mandamus* to compel the Secretary of the Treasury to pay the relator the sum of $4,279.94, with interest from the 9th of November, 1874.

Statement of the case.

On the 18th of June, 1869, the relator, Alexander McLeod, recovered a judgment, in the United States Circuit Court for the District of South Carolina, against one T. C. Callicott for $11,700.68, and costs (p. 4).

The action in which this judgment was recovered

was trover for the conversion of thirty-nine bales of cotton.

The defendant, Callicott, was one of the Treasury agents appointed to carry out and enforce the acts for the collection of abandoned and captured property.

The United States district attorney for the State of South Carolina appeared officially for Callicott (pp. 18, 19).

In June, 1869, a writ of error on the said judgment was sued out of this court by the district attorney, he certifying that "*this writ of error is brought by direction of the Secretary of the Treasury*" (p. 28).

On the 5th of July, 1869, a writ of *fieri facias* was sued out on the said judgment.

On the 17th of February, 1871, the said writ of error was dismissed out of this court, and on the 1st of April, 1872, the mandate was issued.

On the 8th of June, 1874, the court before which the case was tried certified of record that the defendant, Callicott, had *probable cause* for doing the acts constituting the conversion, and that said acts were done *under the direction of the Secretary of the Treasury* (pp. 4, 5, 43, 44).

The effect of this certificate of the court was, in virtue of the 8th section of the act of Congress of 28th July, 1866, (14 Stats., p. 329), to supersede all proceeding under the said judgment, and make it the duty of the Secretary of the Treasury to pay the amount of the judgment out of the proceeds of abandoned and captured property in the Treasury.

Accordingly, on the 9th of November, 1874, the then Secretary of the Treasury, Mr. Bristow, paid the

relator $12,039.50, which he received *on account only*, (the amount of the judgment, with interest and costs, then being $16,319.44) claiming in the receipt which he gave the balance of $4,279.94, with interest from the date of the credit.

On the 28th of November, 1877, the relator made a formal demand on the respondent for the balance of the said judgment, and on the 14th of January, 1878, the respondent refused to pay the same (pp. 10, 11).

In this state of things the petition for a *mandamus* was filed, setting forth the case substantially as above given (pp. 2, 3), and thereupon a rule to show cause was laid on the respondent.

On the 13th of May, 1878, the respondent answered the rule (pp. 7, 11).

He admits the averments contained in the 1st, 2d, 3d, and 4th paragraphs of the petition. He declines to answer as to the matter of the 5th paragraph, on the ground that it is argumentative and presents "nothing but matters of law."

He denies that there was due the relator from the United States on the 9th of November, 1874, any greater sum than $12,039.50. He denies that said sum was paid on account, and avers that it was paid in full.

He says that on the 2d of November, 1874, B. H. Bristow, Secretary of the Treasury, transmitted a transcript of the judgment to the First Auditor to state an account thereon; and that on the 4th of November, 1874, the First Auditor certified to the comptroller that there was due the relator on the said judgment the sum of $12,039.50; and that on

the same day the First Comptroller examined "the account" and certified to the Register of the Treasury "the balance" therein stated, and that on the 6th of November, 1874, a warrant was issued, and on the 9th of the same month delivered to the relator's attorney, James B. Campbell, and paid on the 14th of the said month.

Respondent says that as to whether relator received said warrant in satisfaction or discharge of said judgment, or whether he received the same as a partial payment thereof respondent has no information other than that the said James B. Campbell, when he received said warrant, signed and delivered the following receipt:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

"ALEXANDER MCLEOD
vs.
T. C. CALLICOTT, *Special Agent of the Treasury Department.*

Judgment June 18, 1869, namely, verdict.....	$11,700 68	
Costs.....	119 30	
		$11,819 98
Interest, seven per cent., to Nov. 9, 1874, 5 years, 4 months, 22 days.....		4,463 36
		16,283 34
Costs in U. S. Supreme Court.....		36 10
		16,319 44
Nov. 9, 1874, paid by the United States.....		12,039 50
Balance due, with interest till paid.....		$4,279 94

Received, Charleston, November 9, 1874, by hands of J. E. Hagood, Clerk Circuit Court, District of South Carolina, from the United States Treasury, draft payable to the order of Alexander McLeod for the sum of twelve thousand thirty-nine hundred and fifty one-hundredths dollars, in part payment of above judgment, leaving due a balance of four thousand two hundred and seventy-nine and ninety-four one-hundredths dollars, with interest from this date.

(Signed) JAMES B. CAMPBELL,
Survivor of Campbell & Seabrook, Plaintiff's Attys."

Respondent admits that the relator made demand for the said balance, with interest, on 28th of November, 1877. Respondent sets forth *in hæc verba* his letter of 14th of January, 1878, refusing to pay said balance, and denying his power to do so under § 191, Revised Statutes.

He says that the action in which said judgment was recovered was for the seizure of thirty-nine bales of cotton by T. C. Callicott, Special Agent of the Treasury Department; that said cotton was sold at New York for $4,661.21, which amount, less $1,503.-50 expenses, was paid into the treasury.

Respondent admits that there is a sufficient sum in the treasury, arising from captured and abandoned property, to pay the balance claimed by the relator.

On the filing of the return to the rule, the relator, by his counsel, moved the Court to quash the return, and order a peremptory *mandamus* to issue, which motion the court denied.

Assignment of Error.

The error complained of is the refusal of the court to order a peremptory *mandamus* to issue.

ARGUMENT.

The question in the case.

As appears by the Secretary's answer to the rule, *the sole question* between him and the relator is, whether interest on the said judgment is demandable

from the 18th of June, 1869, the date of the judgment, or from the 8th of June, 1874, the date of the certificate of the court, that Callicott acted with probable cause and by command of the Secretary of the Treasury. *There is no other question in the case*, for the respondent is fully in accord with his predecessor as to the obligation of the United States to pay the judgment, with interest, from the date of the *certificate.*

Legislation of Congress.

In resolving the question of the Government's liability for interest from the date of the judgment, it is necessary to give some attention to the legislation under which the Treasury Department has recognized and acted on the liability of the Government to pay the judgment against Callicott.

By the 8th section of the act of 28th July, 1866, (14 Stats., p. 329), the provisions of the 12th section of the act of 3d of March, 1863, (12 Stats., p. 741), are incorporated into the legislation touching abandoned and captured property. The 12th section of the act of 3d March, 1863, in so far as relevant to this case, provides, "that in all suits or proceedings against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by, or paid to, such officer, and by him paid into the Treasury of the United States in the performance of his official duty," in which a recovery shall be had, "AND THE COURT SHALL *certify* "*that there was probable cause for the act done by the* "*collector or other officer*, OR *that he acted under the di-*

"*rection of the Secretary of the Treasury or other proper* "*officer of the Government*, NO EXECUTION SHALL ISSUE "AGAINST SUCH COLLECTOR OR OTHER OFFICER, BUT THE "AMOUNT SO RECOVERED SHALL, UPON FINAL JUDGMENT, "BE PROVIDED FOR AND PAID OUT OF THE PROPER AP- "PROPRIATION FROM THE TREASURY." The 8th section of the act of 28th of July, 1866, is in these words: "*And be it further enacted* that the provisions of the second, third, and fourth sections of the act approved March second, eighteen hundred and thirty-three, entitled 'An act further to provide for the collection of duties on imports,' *and of the twelfth section of the act approved March third, eighteen hundred and sixty-three*, entitled 'An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes,' shall be taken and deemed as extending to and embracing all cases arising, or which may have heretofore arisen, and all suits and prosecutions heretofore brought and now pending, or which may hereafter be brought, against any officer of the United States, or other person, by reason of any acts done or proceedings had by such officer or other person under authority or color of the act approved March twelve, eighteen hundred and sixty-three, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' or the act approved July two, eighteen hundred and sixty-four, entitled 'An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection:' *Provided*, That such acts done or proceedings had under the two acts last aforesaid, or under color thereof, shall have been done and had

under the authority or by the direction of the executive Government of the United States; *And provided further*, That when a recovery shall have been or shall hereafter be had in any such suit or prosecution brought, or which may hereafter be brought, as aforesaid, the payment of the amount recovered, as provided for in the said twelfth section of the act approved March third, eighteen hundred and sixty-three, aforesaid, shall be made out of the moneys arising and obtained from the proceeds of sales and leases, and fees collected and paid over to the Government under the two acts approved March twelve, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four, aforesaid, in relation to captured and abandoned property."

As connected with the legislation above referred to, it is proper to notice at this point the act of 27th July, 1868, (15 Stats., 243). The *first* section extends the provisions of the 8th section of the act of 28th July, 1866, and the 12th section of the act of 3d March, 1863, to suits against officers or agents of the United States for acts done during the rebellion by virtue or under color of office or employment. The *second section* appertains to suits by aliens, and, therefore, need not be particularly noticed; and the *third section* declares that it was the true intent and meaning of the act of 12th March, 1863, that the remedy therein given in cases of seizure, by suit in the Court of Claims, should be exclusive; precluding suit at common law or any other mode of redress whatever before any other court or tribunal against Treasury agents for any seizure made "in virtue or under color of said act;" and providing that the defendants in all such suits "*may and shall plead or al-*

lege in bar" that the act complained of was done or omitted to be done in the administration of one of the abandoned and captured property acts or in virtue or under color thereof, and that such plea, if sustained, shall be a conclusive bar to the action. This section concludes with a *proviso*, which, however, has no relevancy to the matter in hand.

The effect of the third section of this act was to make it the duty of any treasury agent, sued for any act done or omitted to be done under or by color of the abandoned and captured property acts, to defeat the action by a plea to that effect, and compel the plaintiff to resort to the Court of Claims. But it was not the intention of this section to take away from the defendant in any such action the indemnity afforded by the 8th section of the act of 1866 in case he should fail to interpose the plea in bar authorized by this 3d section of the act of 1868, for so far from the latter act repealing the 8th section of the act of 1865 in this respect, it expressly extends the operation of that section to another class of cases, and contains nothing from which an intention to repeal it can be implied.

It will be seen by reference to the record in *McLeod* vs. *Callicott*, Exhibit 1 (pp. 18, 19), that Callicott pleaded in bar of the action that he seized the cotton mentioned in the declaration as a supervising special agent of the Treasury Department in the administration of the abandoned and captured property acts, "and in virtue and under color thereof." The

issue joined under this plea was found against the defendant, Callicott, and judgment went for the damages assessed by the jury.

But it being certified by the court, and it appearing also in the record otherwise, that Callicott made the seizure complained of by command of the Secretary of the Treasury, he, Callicott, became entitled to the indemnity provided by the 8th section of the act of 1866, in cases where the officer acted under the direction of the Executive Department, and accordingly the Government made the payment which, as we maintain, was only a partial satisfaction of the judgment against Callicott.

The obvious intention of Congress in extending this protection to revenue officers and Treasury agents where judgments are recovered against them for acts done under orders or in the course of *bona fide* official administration, was to secure promptness, efficiency, and unquestioning, unhesitating obedience to orders; and we take leave to say that in the enforcement of the abandoned and captured property acts it was especially important that the ægis of the government should be thrown over every officer who acted in good faith or under orders from the Secretary of the Treasury.

The question as to Interest.

We come now to consider the decision of the Secretary of the Treasury on the subject of the demand for interest on the judgment against Callicott. The Secretary maintains that interest is allowed from the date of the certificate of the court, because it was from

that time only that the liability of the Government to pay the judgment began. Is this a sound construction of the 12th section of the act of 1863, anp the 8th section of the act of 1866?

It must be kept steadily in view that the object of Congress was to afford protection to officers who had become *wrong-doers* by violation of law and liable for damages to parties aggrieved by their tortious conduct. It was in no sense the purpose of Congress to sanctify or justify wrong, but, on public considerations, to substitute the liability of the Government, in certain cases, for that of the wrong-doers. The provision that this substitution of liability should take place upon the court's certifying that the officer against whom there had been a recovery had acted with probable cause or by command of the Secretary of the Treasury, was a provision *for the benefit of the officer proceeded against* and not the aggrieved plaintiff. In such cases the action is in no sense an action against the United States, but against the officer only as a *tortfeasor*. It cannot be contended with plausibility even that it was the purpose of Congress to prejudice the aggrieved plaintiff and deprive him of his rights at common law in cases of this kind, by intercepting execution and substituting the liability of Government. It would, indeed, require the most express language to warrant this court in attributing to Congress an intention to perpetrate so wanton injustice.

The intention of Congress being to protect the officer sued upon grounds entirely foreign to the plaintiff's cause of action, and of a public character, there is not the least room for the contention that Congress

was, in any degree, moved by a consideration for the plaintiff. It must follow then that it is the defendant's, and not the plaintiff's, duty to procure the certificate of the court; which being authorized out of regard for the defendant alone, it would seem to be absurd to say that the plaintiff is chargeable with any duty, whatever, touching it. The law recognizes the plaintiff's right to look to the defendant, solely, for satisfaction, so long as there is no certificate to supersede proceeding under his judgment. Indeed, the plaintiff may prefer to look to the defendant, rather than encounter the vexation and delay of urging his demand before the Treasury Department. And such was McLeod, the relator's disposition; for, as we have already seen, he promptly sued out a *fi. fa.* on his judgment. Certainly it is not a matter of which the Government can complain, that the relator was energetic in enforcing his judgment against Callicott.

If, then, there is no duty in respect of the certificate, cast on the plaintiff in a suit against a collector of the revenue, or Treasury agent, it is difficult to comprehend how McLeod can be prejudiced by the fact that the certificate in his case was not made until June, 1874. It is clearly the intent of the law that, in assuming the liability of the officer against whom a recovery has been had, the Government should stand exactly in the shoes of the delinquent officer. The language of the 12th section of the act of 1863 is that "*the amount so recovered* shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury;" and the 8th section of the act of 1866, is to the same effect, except as to

the source from which payment of the "amount recovered" is to be made.

Now, what was the "amount recovered" by the judgment against Callicott?

By the 8th section of the act of 23d August, 1842, (5 Stats., p. 578) it is provided that on all judgments thereafter recovered in all United States Circuit and District Courts interest shall be allowed from the date of the judgment, and may be levied in all cases where, by the law of the State in which the court shall be held, interest may be levied under execution on judgments recovered in the courts of the State, *such interest to be calculated from the date of the judgment*, and at such rate as is allowed on judgments by the law of the State. (See § 966, R. S. U. S., and 14 How., 328, *Perkins* vs. *Fourniquet*.) By section 2d of the act of December 8th, 1866, to repeal the usury laws of the State of South Carolina, it is provided "that *in all money decrees and judgments* of courts of law and equity, hereafter enrolled or entered, in all cases of accounts hereafter stated, and in all cases wherein any sum or sums of money shall hereafter be ascertained, and, being due, shall draw interest, according to law, the legal interest shall be and remain at the rate of seven *per centum per annum*," (13 S. C. Stats. at Large, p. 429).

Both of these acts were in force at the time the judgment against Callicott was rendered. Such being the Federal and State law touching interest on judgments, it follows, then, that interest at the rate of seven *per cent. per annum* was as much a part of the "amount recovered" against Callicott as the precise

sum mentioned in the verdict of the jury, for, in the language of this Court in the case above referred to (14 How., 313), "*the judgment bears interest by force* "*of the law, although upon the face of it it may not* "*purport to carry interest.*"

The duty of the Secretary being to pay the "*amount recovered*" against Callicott, his answer to the relator's demand, that interest is only allowable from the time *the liability of the Government attached*, is nothing short of an attempt to exercise a dispensing power over the express language of the statute, and frustrate its plain intent.

The unsoundness of the Secretary's position that the relator had no claim against the Government for interest except from the date of the certificate, is shown by the injustice it has inflicted by withholding interest from the 28th of June, 1869, the date of the writ of error, to the 17th of February, 1871, the date of its dismission, during all which period the writ of error was a supersedeas, *ipso facto*, having been sued out by direction of Secretary of the Treasury (Rec., p. 28, and Rev. Stats., § 1000). Now, upon what principle of construction are the acts of Congress providing for the payment of the "amount recovered" against a delinquent officer made to work so flagrant injustice?

Again, it must be remembered that it will never happen that a certificate of the court will be asked in any case where the Government directs a writ of error to be sued out and prosecuted until after a judgment of affirmance in error, because until that time it cannot be known whether the judgment will be enforced,

and because, as we have seen, a writ of error sued out by order of the Government is a supersedeas. Now, we ask, did Congress intend that in all such cases the plaintiff in the judgment should lose his interest for the long period of the pendency of the case in error? —in other words, that the Secretary of the Treasury might tie the hands of the injured plaintiff by a supersedeas, and then, after an affirmance and the entering of the certificate, withhold interest for the time his hands were tied? We confidently assert that this flagrant injustice to which the Secretary's interpretation of these laws leads, is, of itself, conclusive that Congress could not have intended to limit the demand for interest to the date of the court's certificate. It is impossible to conclude that Congress meditated such an invasion of the rights of the citizen.

Validity of the Court's Certificate.

As it was insisted in the court below, by the respondents counsel, although no such point is made in the answer to the rule, that the court's certificate was not valid because not made during the term of court at which the judgment in *McLeod* vs. *Callicott* was rendered, it is deemed proper to notice the point here.

The language of the act of 1863 is, * * * " and where a recovery shall be had in any such suit " or proceeding, and the court shall certify, &c." It so happens that this court has been called on to construe this language at the present term, in the case of *Andreae* vs. *Redfield et als.* The Court say, in that case, " certificates of the kind *are never given until*

the litigation is closed, and of course it cannot be known whether it will be given or refused *pending the litigation;*" and, therefore, so long as "the litigation" is *open*, the certificate cannot be properly applied for or given. Certainly then the certificate could not have been properly given in *McLeod* vs. *Callicott*, while the case was pending in the Supreme Court, nor until after the 1st of April, 1872, the date of the issuing of the mandate of that court. Until the mandate was filed in the court below, that court could not know that "the *litigation*" in the case had *closed*, and so, that the proper time had come for granting the certificate, when applied for. Furthermore, it is very clear that it could not have been the intention of Congress that the officer sued should apply for the certificate until after all contest as to his liability had ceased and been finally settled. Indeed, it was the intention of Congress that the right to apply for the certificate should be resorted to in the last extremity only, and that the liability of the Government should not be fixed until then.

It being clear, then, that no certificate could have been applied for by Callicott until after the 1st of April, 1872, it remains to inquire whether the certificate is invalid because not applied for until the 8th of June, 1874.

The act of 1863 contains nothing which can be construed as a limitation of the time for making application for the certificate, and the practice under the act has been liberal and accordant with its true spirit. In the case of *U. S.* vs. *The Ship "Recorder"* (2 Blatch., 119), the certificate was granted, although

the collector had neglected to apply for it *for more than two years and four months*, and until after the claimant had sued him for the seizure.

The question is frequently presented in cases arising under statutes denying costs unless the court which tried the case will certify to a given effect. Thus, in the case of *Heaton* vs. *Ferris* (1 Johns., 146), the question was as to costs only, under a statute which provided that in actions of trespass, where the damages found were under five dollars, the plaintiff should recover no more costs than damages, unless the judge, at the trial of the cause, should find and certify under his hand upon the back of the record that the freehold or title of the land mentioned in the declaration was chiefly in question. A verdict for six cents damages was rendered in June, 1804, but the certificate required by the act to enable the plaintiff to recover full costs was not made by the judge who tried the cause until the 29th of January, 1806. The Court held that "*the certificate was properly granted.*" In a late English case, which was an action for a misrepresentation, a verdict was rendered against G. & J., and leave was given to move to enter the verdict *for* J. The Q. B., denying the motion, held both defendants to be liable. The case was then taken to the Exchequer Chamber, where the judgment of the Q. B. was *reversed*, and the verdict ordered to be entered *for* J. Thereupon the plaintiff applied to the Lord Chief Justice, before whom the case was tried, for a certificate of probable cause under the act of 3 and 4 Wm., 4 ch. 42, § 32, by which the defendant, J., was entitled to his reason-

able costs, unless probable cause was certified under the hand of the judge who tried the cause. The judge made the certificate, and it was held to be valid. (L. R., 9 Q. B., 560, *Swift* vs. *Jewsbury*.) To the same effect is *Foxall* vs. *Banks* (5 Barn. & Ald., 536.)

The power to make the certificate is entirely within the discretion of the judge. He may make it or not, and he may make it whenever he deems proper, and his action in this regard is not subject to review.

But, as it appears by the record in *McLeod* vs. *Callicott* (pp. 41, 42, and 22, and see the judge's certificate, p. 4), that Callicott's conversion of McLeod's cotton was done by the express order of the Secretary of the Treasury it was not necessary for the judge to certify at all; the object of the certificate being to put into the record something which was not already there. Lord KENYON took precisely this view under the statute, 22 and 23 *Car.* 2, ch. 9, holding that the certificate required by that act was not necessary as the record showed the very matter which the statute required to be certified before the plaintiff could have full costs. The case was a motion to direct the master to review his taxation and allow the plaintiff full costs; and the motion prevailed over the powerful opposition of Gibbs, Topping, Holroyd, Scarlett, and Yates (6 T. R., 562, *Smith* vs. *Edge*). It is stated in a note at the end of *Grindley* vs. *Holloway* (Douglass, p. 308), that Lord MANSFIELD and BULLER, J., had ruled the same way in *Rann* vs. *Pickens*, B. R. M., 23, Geo., 3.

Supposing, however, *argumenti gratia*, that the judge's certificate should have been made earlier—say

during the term at which the judgment was rendered—we maintain that as the certificate was necessarily based on matter which was *of record*, it could be made at any time, *nunc pro tunc*. *Insurance Co.* vs. *Boon* (95 U. S., pp. 125–6); *Sizer* vs. *Many* (16 How., 98).

That the amount paid by the United States to the relator was not accepted by him as satisfaction in full, appears clearly from the receipt given by his attorney, a copy of which is embodied in the respondent's answer (pp. 9, 10). But if there had been an agreement between the United States and the relator that this payment should discharge the judgment, it would have been inoperative and of no effect, because a *nudum pactum* (1 Smith's L. C., 595, *Gumber* vs. *Wane*), the same law governing the transaction as if it had been between private individuals (15 Wall., 47, Smoot's Case). Even where the demand against the Government is *unliquidated and sounds in damages*, this court has repeatedly held that the receipt of a less sum by the claimant must, to operate as a discharge of the Government, have been *accepted as satisfaction in full* (17 Wall., 78, *Sweeny* vs. *U. S.*; 13 Wall., 37, *U. S.* vs. *Clyde*).

Is the remedy by Mandamus?

It is submitted that the certificate of the judge that Callicott made the conversion in obedience to the orders of the Secretary of the Treasury, fixed the liability of the United States under the 12th section of the act of 3d March, 1863, (12 Stats., 741,) and the 8th section of the act of 28th July, 1866, (14 Stats., p. 329,) and made it the duty of the Secretary of the

Treasury to pay the whole amount of the judgment out of the proceeds of abandoned and captured property.

It is difficult to see how the Secretary could refuse to obey the explicit terms of these statutes without virtually arrogating the right to nullify them. It does, sometimes, occur that resort must be had to *construction*, in order to get at the legislative intent, and in such cases, as this court has more than once laid down, the executive officer called upon to act must expound the statute for himself, and *mandamus* will not lie to compel him to alter his construction, however erroneous it may be; but, we maintain, with confidence, that neither this court nor any other court, controlled by the principles of the common law, has held that where a statute or several statutes *in pari materia*, direct an officer to perform a duty, in plain and unambiguous language, such officer can refuse to act, under the pretext that he is not bound to do what is thus plainly required of him.

The statutes in question being thus plain and explicit, and the Secretary having admitted in his answer to the rule, that there is in the Treasury "*a sufficient sum* arising and obtained from the proceeds of sales and leases and fees collected and paid over to the Government under the two acts approved March 12th, 1863, and July 2d, 1864, in relation to captured and abandoned property *to pay the demand of the relator*" (see answer, p. 11); and Congress having, by the 8th section of the act of the 28th July, 1866, made the necessary appropriation authorizing payment of the judgment out of that fund, it is difficult

to see on what ground the relator's motion for a peremptory *mandamus* was denied.

But, it may be contended, that the function of the Secretary in the matter in hand was executive and political, and, therefore, involved judgment and discretion. This contention, however, must be restricted, necessarily, *to the determination of the question of the liability of the Government;*—we say it must be so restricted, because it would seem to be beyond the ingenuity of any mind to invest the duty of the Secretary, consequent upon that liability, with a political or executive character; for the statute says, "that when a recovery shall have been, or shall hereafter be, had in any such suit or prosecution, brought, or which may hereafter be brought, as aforesaid, the payment of the amount recovered, as provided for in the said twelfth section of the act approved March third, eighteen hundred and sixty-three, aforesaid, shall be made out of the moneys arising and obtained from the proceeds of sales and leases and fees collected and paid over to the Government under the two acts * * * in relation to captured and abandoned property." (Act of July, 1866, § 8.) The liability of the Government being once established, the duty of the Secretary, under that liability, is plainly ministerial, and in no sort executive or political. Where language is so clear and the thing to be done so distinctly defined, there is no room for judgment or discretion. The act required to be done by the Postmaster-General, in *Kendall* vs. *United States* (12 Peters, 524), was no more "precise and definite" than is the thing required to be done by the acts of March,

1863, and July, 1866, in cases where the liability of the Government has attached. The thing required to be done by the Secretary in such cases is to pay the judgment out of the fund arising from captured and abandoned property, and nothing more. If this is not a purely ministerial act, wholly without judgment or discretion, we confess our inability to comprehend what is a ministerial act.

It is apparent then, as we conceive, that if there is an element of executive discretion or judgment in this case it must be as to the question of the liability of the Government, *and cannot be as to the duty of the Secretary consequent on that liability.*

But, if we should concede that in determining the liability of the Government under the above-mentioned statutes the Secretary exercised judgment and discretion, we do not perceive that the case of the respondent would be advanced thereby. For in that view the decision of Secretary Bristow on the question of liability is necessarily *final* and *conclusive*, and it would be in vain for the respondent to resist the relator's motion on the ground that that decision was erroneous, seeing that this court has, upon great consideration, held that the decision of an executive officer touching a political or executive duty must be treated as *final and conclusive* in an application for a *mandamus* to such officer in respect of any duty of that character. In *Decatur* vs. *Paulding* (12 Peters, 497), Mrs. Decatur sought to compel the Secretary of the Navy to allow her a pension under a general act and a joint resolution passed on the same day—the Secretary and his predecessor, Mr. Dickerson, having

decided that she was entitled to claim under one or the other, as she might elect, but not under both. The question was one of difficulty; and this court held that, as it appertained to the Secretary's executive duties to interpret these laws, his decision, however erroneous it might be in the opinion of the court, was conclusive and beyond the control of the court, so far as that case was concerned. The same doctrine was enunciated and enforced with distinguished ability in *Gaines* vs. *Thompson* (7 Wall., 347).

As the doctrine laid down in these cases, that the discretion exercised by an executive officer in the conconstruction of a statute cannot be controlled by mandamus, was, at the same time, held to be entirely consistent with the doctrine advanced in *Kendall* vs. *U. S.*, in which the court decided that a mandamus was properly granted to compel the Postmaster General to perform a duty cast upon him by an act of Congress, it is proper to consider the *ratio decidendi* of these cases.

As we apprehend, the cases of *Decatur* vs. *Paulding* (*supra*), and *Gaines* vs. *Thompson* (*supra*), turned on the point that the statutes by which the officer's duty was created were involved in doubt and difficulty, and required a resort to construction, and so, an exercise of judgment and discretion. In the former case the Court say, "A resolution of Congress, *requiring the exercise of so much judgment and investigation*, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary." (pp. 515, 516.) In the latter case the Court say, "The validity of plaintiff's entry, which is involved

in their decision, is a question which requires the careful consideration and construction of more than one act of Congress. It has been a long time before the Department, and *has received the attention of successive Secretaries of the Interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney-General. It is far from being a ministerial act under any definition given by this court.*" (p. 353.) On the other hand, it was decided in *Kendall* vs. *U. S.* that the act required to be done being merely to credit the relator with the full amount of the award of the solicitor, and being precise and definite, involving no discretion whatever, mandamus would lie to compel its performance.

That the true distinction lies where we have placed it, is made clearer by the dissenting opinion of McLEAN, J., in the case of *Decatur* vs. *Paulding*. He says: "I differ from a majority of the judges, who hold that the construction of this resolution, giving to the relatrix a pension, is a duty, in the discharge of which an executive discretion may be exercised. *The law is directory and imperative, and admits of the exercise of no discretion on the part of the Secretary.* The amount of the half-pay pension given in the resolution is fixed by law, and is, therefore, certain. *I am authorized to say that my brother*, STORY, *agrees with this view of the case.*" (p. 517.)

It is submitted, then, that if the distinction above mentioned is not well founded, it must follow that *mandamus* will lie *in no case against a public officer to compel the performance of a statutory duty.*

Furthermore, the decision of Secretary Bristow in

this case is binding upon the respondent, his successor, as has been held by this court in a case directly in point. (15 Peters, 400, 401, *U. S.* vs. *Bank of the Metropolis.*) But the respondent makes no question upon the decision of his predecessor in his answer to the rule. *He does not impugn that decision in any way*, but concedes the validity of it, in basing his refusal to comply with the relator's demand solely and exclusively on the ground that interest was not demandable from the United States on the judgment against Callicott, except from the date of the judge's certificate, which, we repeat, *is the whole question in the case.*

At this point it is proper to give some attention to the position taken by the respondent in his answer, (p. 11) that he is forbidden by section 191 of the Revised Statutes to comply with the relator's demand, if he were minded to do so.

Upon reference to the section referred to it will be seen, at a glance, that the respondent is egregiously mistaken in supposing that it has any application whatever to the case at bar. It provides that the *balances* which may, from time to time, be stated by the auditor and certified to the heads of departments by the Commissioner of Customs or the Comptroller of the Treasury, *upon the settlement of public accounts*, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the Government, and subject only to the revision of Congress or the proper courts. That this section refers to the open and unliquidated accounts of the disbursing officers of the Gov-

ernment only, is, we submit, too plain for argument. "The balances" mentioned represent merely the difference between the sums total of the debtor and creditor sides of ordinary accounts, and nothing more; and there is something remarkable in the respondent's pretension that the judgments of the Circuit Courts of the United States come within the purview of the section referred to.

It is now for the first time asserted that the accounting officers of the Treasury Department have this tremendous revisory power, and that if they cut down the amount recovered by any such judgment, the Secretary of the Treasury is without authority to enforce the judgment according to its tenor and effect. It follows from this, necessarily, that if the accounting officers of the Treasury have this power over judgments of the Circuit Courts, they can also review the judgments of the Court of Claims, which have been heretofore considered final. We apprehend that such a doctrine will never receive countenance from this court.

The duty which the respondent was requested to perform by the relator being, as I have endeavored to show, purely ministerial, enjoined by law, and possible to be performed by the respondent, and it being too obvious for discussion or reference to authority that the ordinary remedies afforded by the law are entirely inadequate to give the relator the redress to which he is entitled—namely, satisfaction out of the national fisc, it follows, that a case is presented for the application of the extraordinary remedy by mandamus.

If, however, the court should be of opinion to af-

firm the judgment, we respectfully ask that it will put an end to further controversy by deciding whether the relator has any remedy against the United States, and, if he has, what that remedy is.

P. PHILLIPS,
WM. A. MAURY,
of Counsel for the Relator.

In the Supreme Court of the United States.

THE UNITED STATES EX REL. ALEXANDER McLEOD, PLAINTIFF IN ERROR,
vs.
JOHN SHERMAN, SECRETARY OF THE TREASURY.

No. 843.

BRIEF FOR DEFENDANT IN ERROR, RESPONDENT BELOW.

In the Supreme Court of the United States.

THE UNITED STATES EX REL. ALEXANDER McLEOD, plaintiff in error,
vs.
JOHN SHERMAN, SECRETARY OF THE Treasury.
} No. 843.

BRIEF FOR DEFENDANT IN ERROR, RESPONDENT BELOW.

HISTORY OF THE CASE.

On the 1st June, 1866, Alexander McLeod brought an action against T. C. Callicott for trover and conversion (p. 16), and the case was by the consent of counsel removed to the United States circuit court for the South Carolina circuit (p. 17).

The declaration (pp. 17 and 18) charged the finding and conversion to defendant's own use of 39 bales of cotton in October, 1865, and the defendant entered his plea of not guilty (p. 18), and subsequently filed a special plea (p. 19) under section 3 of the act of July 28, 1866. The verdict of the jury was for the plaintiff in the sum of $11,700.68 (pp. 4 and 20), and judgment was entered thereon June 18, 1869, Chase, C. J., and Bryan, D. J., sitting. A *fieri facias* was issued (p. 4) at the instance of plaintiff's attorneys on the 5th day of July, 1869 (see

Appendix to Record), but was superseded by a writ of error from this court, brought by direction of the Secretary of the Treasury (p. 28).

On the 17th February, 1871, the writ of error was dismissed, and on the 1st April, 1872, a mandate to that effect issued (p. 6).

On the 8th June, 1874, the Hon. George S. Bryan, judge of the district court of the United States for the district of South Carolina, directed the "*certificate of probable cause*," contained on pages 4 and 5 of the printed record of this case, to be entered on the journals of the circuit court. This was done on motion of plaintiff, and without notice to either the defendant or the United States (p. 43).

On the 2d November, 1874, the then Secretary of the Treasury transmitted to the First Auditor of the Treasury a certified transcript of the judgment rendered 18th June, 1869 (p. 8).

Under section 178, Revised Statutes, the chief clerk of the First Auditor's Office, in the absence of the First Auditor, stated an account in favor of Alexander McLeod for the sum of $12,158.80, as follows:

Principal	$11,700	68
Interest at 7 per cent. from June 8, 1874, to November 5, 1874, 151 days	338	82
Costs to J. E. Hagood, clerk	119	30
	12,158	80

"to be paid from the proceeds of captured and abandoned property (p. 8)."

The First Comptroller having examined the account, it followed the course laid down by law (pp. 8 and 9), and the draft for $12,039.50, issued pursuant thereto, was, after the indorsement of Alexander McLeod, paid

by the assistant treasurer at Charleston, S. C. (p. 3, Appendix to Record).

The Assistant Secretary of the Treasury, in signing the warrant for this allowance, was acting under section 246, Revised Statutes. And he therein directed that payment should be made from the appropriation for return of proceeds of captured and abandoned property.

On the 28th November, 1874, McLeod demanded from Hon. John Sherman, Secretary of the Treasury, payment of the further sum of $4,279.94, with interest at 7 per centum from the 9th November, 1874.

This sum, $4,279.94, was for interest disallowed by the First Auditor and First Comptroller on the 4th November, 1874, and would be interest on $11,700.68 (the amount of the judgment against Callicott) from the 18th June, 1869, the day judgment was entered, until the 8th of June, 1874, the day the certificate of probable cause was filed by Judge Bryan.

The Secretary of the Treasury, on the 14th January, 1878, refused and declined (pp. 10 and 11) to make said payment, and McLeod thereupon filed his relation in the court below (pp. 2 and 3), together with Exhibit 1 (pp. 15 to 45), Exhibit 2 (pp. 4 and 5), and Exhibit 3 (p. 6).

To the order of the court commanding him to show cause why a peremptory writ of mandamus should not issue as prayed for, the respondent filed his answer (pp. 7 to 11).

Upon motion to quash the answer, and to issue a peremptory mandamus notwithstanding the same (p. 12), the court, on the 21st May, 1878, dismissed (pp. 11 and 12) the rule to show cause made on the 17th April, 1878 (p. 6).

The relator thereupon sued out this writ of error.

The record presents the following papers: (1) The petition of the relator, with Exhibits 1, 2, and 3; (2) the answer of the respondent; (3) the motion of the relator for a peremptory mandamus; (4) the judgment of the court below.

The failure of the relator to traverse the return, and his motion for a peremptory mandamus notwithstanding the same, is an admission that all matters sufficiently pleaded in the return are true (§ 490, High on Extraordinary Remedies).

Lord Tenterden says, in King *vs.* Mayor and Alderman of London (3 Barn. and Ad., 255): "On the true construction of this statute* the party, if he intends to traverse any fact, must do so before he sets the return down for argument and takes the opinion of the court as to its sufficiency."

And the question before the court is, whether the facts sufficiently pleaded in the relation, and not traversed in the return, taken with the facts sufficiently pleaded in the return, make out a case in which the supreme court of the District of Columbia should have issued the mandamus prayed for.

ARGUMENT.

I.

The decisions of this court have been uniform that the writ of mandamus against officers of the executive departments will only issue when there is a duty imposed by law upon such officer, and that duty is purely ministerial, and our argument is, that no law has imposed

*"*This statute,*" 9 Anne, ch. 20, held (17 Wall., 608) to be in force in this country. See also State *vs.* Lean (9 Wis., 279).

upon the respondent the duty of doing that which the relator seeks by mandamus to compel him to do; that performance of the demand of the relator involves the exercise of discretion, not only by the Secretary of the Treasury, but by the First Comptroller and Register, who are by law independent of the respondent; and that respondent is expressly forbidden to increase the amount already allowed and paid the relator.

A brief exposition of the division of responsibility of the several officers of the Treasury Department will, we think, satisfy the court that the relator, however absolute his right to the money, has mistaken his remedy in asking for a mandamus commanding the Secretary of the Treasury *to pay money* from the Treasury.

Section 305, Revised Statutes, makes the Treasurer, and not the Secretary of the Treasury, custodian of the public money. "The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by either Comptroller, and recorded by the Register, and not otherwise."

It would be physically impossible for the Secretary of the Treasury to obey a mandamus such as that prayed for.

The disbursement of the public money requires the co-operation of several distinct officers, and a mandamus *to pay* should be directed only to the Treasurer, and that after the preliminary steps had been taken by other officers designated by law.

Even if the relator is right—that the damages have been liquidated by the judgment of a court, and therefore the duties of the executive officers are purely ministerial—he should not have a mandamus commanding

an officer to do any act beyond the scope of his lega powers.

If the duties of the several officers are ministerial, the mandamus should be directed to the First Comptroller, the Secretary, the Register, and the Treasurer, commanding each to perform the share assigned him by law.

The First Comptroller should be directed to examine the account, reverse the decision of the First Auditor, and certify to the Register the balance claimed (§ 269, R. S.).

The Register should then be directed to transmit (§313, R. S.) to the Secretary a copy of the certificate of balance. Then the Secretary should be directed to grant a warrant (§ 248, R. S.) for the amount. The First Comptroller should then be directed (§ 269, R. S.) to countersign the warrant, and the Register be directed (§ 313, R. S.) to record the amount, and certify such action on the warrant.

Then, and not till then, could a mandamus issue commanding payment. And it should be directed not to the respondent in this action, but to James Gilfillan, who is Treasurer of the United States. And the several writs of mandamus against these officers should be preceded by formal demand and refusal.

This defense would seem to dispose of the whole case.

II.

But at various stages of this procedure discretion has by law been reposed.

The judgment of the circuit court for the fourth circuit, entered on the 18th June, 1869, being a judgment in trover against T. C. Callicott, in his individual capacity,

and the verdict of the jury being a denial of Callicott's pleas, something was necessary extrinsic to the judgment to impose any obligation on the United States.

In some one there reposed the duty of weighing this extrinsic evidence to ascertain whether it was incumbent upon the United States, under any act of Congress, to pay the debt that had been adjudged to be due from Callicott, and whether there was an appropriation sufficient for the purpose. Section 236, Rev. Stats., requires that all claims and demands against the United States, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury. (See Cooke *vs.* United States, 91 U. S. S. C., 398, 399.)

The officers in the Treasury Department to whom is confided the duty of settling and adjusting such accounts are the Auditors and Comptrollers, and the decision of the validity of this account of *McLeod against the United States* rested primarily in the First Auditor, and finally in the First Comptroller.

With the correctness of their decision we have nothing to do, and we will discuss it merely for the purpose of showing the gravity of the questions determined by them.

The laws governing the payment by the United States of judgments recovered against their officers or agents are contained in the following statutes: §§ 2, 3, 4, of the act of March 2, 1833 (4 Stat., 632, 633); § 12, of the act of March 3, 1863 (12 Stat., 741); § 8, of the act of July 28, 1866 (14 Stat., 329); §§ 1 and 3, act of July 27, 1868 (15 Stat., 243, 244). (See Appendix.)

Callicott's plea was that he made the seizure under color of the act of March 12, 1863 (12 Stat., 820).

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In some one there reposed the duty of weighing this extrinsic evidence to ascertain whether it was incumbent upon the United States, under any act of Congress, to pay the debt that had been adjudged to be due from Callicott, and whether there was an appropriation sufficient for the purpose. Section 236, Rev. Stats., requires that all claims and demands against the United States, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury. (See Cooke *vs.* United States, 91 U. S. S. C., 398, 399.)

The officers in the Treasury Department to whom is confided the duty of settling and adjusting such accounts are the Auditors and Comptrollers, and the decision of the validity of this account of *McLeod against the United States* rested primarily in the First Auditor, and finally in the First Comptroller.

With the correctness of their decision we have nothing to do, and we will discuss it merely for the purpose of showing the gravity of the questions determined by them.

The laws governing the payment by the United States of judgments recovered against their officers or agents are contained in the following statutes: §§ 2, 3, 4, of the act of March 2, 1833 (4 Stat., 632, 633); § 12, of the act of March 3, 1863 (12 Stat., 741); § 8, of the act of July 28, 1866 (14 Stat., 329); §§ 1 and 3, act of July 27, 1868 (15 Stat., 243, 244). (See Appendix.)

Callicott's plea was that he made the seizure under color of the act of March 12, 1863 (12 Stat., 820).

It is apparent from the certificate of the Acting First Auditor (in which the First Comptroller concurred) that the construction put by him on the law was:

1. That a judgment against Callicott *in propriam personam* of itself imposed no obligation upon the United States.

2. That a certificate of probable cause was necessary and sufficient.

3. That the certificate presented was valid although at variance with the verdict of the jury. (See in this connection the opinion of Chase, C. J., on the motion for a new trial, Johnson's Report, p. 451.)

4. That the certificate given on the 8th June, 1874, five years after the entry of judgment, and forming no part of the judgment itself, was valid, although given without notice to defendant and at the instance of plaintiff, and although given by Judge Bryan, who does not appear by the record to have participated in the trial, and who did not join in sealing the bill of exceptions.

5. That the United States became bound to pay not only "the amount so recovered upon final judgment" (sec. 12, act March 3, 1863), but also interest on the same during the delay of the United States in making payment.

6. That the obligation of the United States arose on the day that Judge Bryan entered the certificate, and the detention of the debt by the United States in recompense for which interest should be paid, commenced on the 8th June, 1874.

7. As a matter of evidence he decided that the rate of interest in South Carolina was seven per centum.

8. He decided further that, although the proceeds turned into the Treasury from the sale of the cotton

seized by Callicott amounted to only $3,157.71 (p. 11, record, $4,661.21, less $1,503.50), yet the law required payment of the judgment far in excess of that amount, together with interest.

9. He decided that the rights of McLeod were not impaired by the changes wrought in the law by the revision of the statutes.

10. He decided, (but subject to the approval of the Secretary of the Treasury,) that payment should be made from the appropriation for return of proceeds of captured and abandoned property.

We will not inquire whether the Register had any discretion on receipt of the First Comptroller's certificate, but will follow the copy of the certificate transmitted by the Register to the Secretary of the Treasury.

Upon its receipt the Secretary might communicate to the First Comptroller *any facts* in his judgment affecting the correctness of the balance, but could not change or modify the same (§ 191, R. S.)

Before signing a warrant for the balance, however, he must inquire (§ 248, R. S.) whether the limitations prescribed by law had been complied with, and whether there was an appropriation on which the warrant could be drawn (§§ 248, 3679.)

Having decided (§ 248) that payment would be pursuant to an appropriation by law, and (§ 3675) having specified on the face of the warrant the particular appropriation and charged the same on his books, the warrant would go to the Register, who by § 313 is required to keep all accounts of the receipts and expenditures of the public money.

Here, if not before, it must be decided as a question of fact, whether the unexpended balance of the appro-

priation specified is sufficient to pay the warrant. If not, it would be unlawful for the Register to record the warrant (§ 3679) and transmit it.

Indeed, the law provides a triple check against payments in excess of the appropriation, by directing (§ 3675, R. S.) that the warrant shall be charged to such appropriation in the books of the Secretary, First Comptroller, and Register, and upon the exhaustion of an appropriation it would be unlawful for either to attempt to give validity to a warrant on the same.

Whether the Register or the First Comptroller would be entitled to review the decision of the Secretary in the selection of an appropriation, we will not here examine. It is certain that the re-transmission of the warrant through the Register and First Comptroller, is an effectual check on any effort by a Secretary to change or modify the balance found by the First Comptroller.

Clearly there is a discretion resting in some executive officer to decide whether a judgment in trespass against an individual is one which has been assumed by the United States; there is a discretion somewhere to decide whether interest, and for what time, is included in the obligation; there is a discretion somewhere to decide whether Congress has provided an appropriation for the payment of the debt, and there is a discretion somewhere to decide whether that appropriation has been exhausted.

In the case of Decatur *vs.* Paulding (1840) (14 Peters 497), it was considered that similar discretions were reposed in the Secretary of the Navy, and a mandamus to pay money to the relator was refused, but the argument against the allowance of the writ in this case is stronger by reason of the distribution among the Secre-

tary, the Register, and the First Comptroller, of the several discretions, which formed the basis of the decision in Decatur *vs.* Paulding.

In the view which we take of this case, the correctness of the decisions of the First Comptroller and Assistant Secretary of the Treasury is unimportant, but the following observations are offered that the court may see the difficulties with which the decisions were surrounded.

With the decision of the Register, to wit, that of the proceeds from captured and abandoned property there remained sufficient in the Treasury to pay the allowance of the First Comptroller, we have no fault to find, but we think the First Comptroller erred in allowing any interest, and we think the Assistant Secretary transcended his authority in directing payment from the appropriation "for return of proceeds of captured and abandoned property," or in directing payment at all.

The act of July 27, 1868, by its first section, extended to all officers or agents of the government, civil or military, for acts done during the rebellion while acting by virtue or under color of their office or employment, the beneficial provisions theretofore extended to persons engaged in executing the acts relative to captured and abandoned property; and then by the third section prescribed an entirely different rule for persons acting in virtue of or under color of the act of March 12, 1863, and July 2, 1864.

The proviso attached to the third section applies to the whole act and should be read as though it were a separate section.

Now, the jury and the judgment of the court placed Callicott and his judgment outside of and beyond the captured and abandoned property act and the captured and abandoned property fund.

The provision of section 3, however, that the remedy for owners should be exclusively in the Court of Claims, and prohibiting any other mode of redress whatever, completely negatives the idea that payment under the first section should be as prescribed in the last proviso of section 8 of the act of July 28, 1866, to wit, from the proceeds of captured and abandoned property; and remits the parties to section 12 of the act of March 3, 1863, to wit: "The amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

It would do violence to the statute, we think, to hold that the amount should be paid from the proceeds of captured and abandoned property in face of the provisions that the remedy of owners in the Court of Claims should be exclusive, precluding any other mode of redress; and that a plea that the act was done under either of the statutes mentioned should be a bar; and that owners who had complied with the law and sought the exclusive remedy were entitled only to the proceeds of their cotton.

Clearly Congress did not by section 1 of the act of July 27, 1868, intend that the fund arising from the proceeds of captured and abandoned property should be used to pay judgments against any officer or agent of the government, civil or military, for acts done during the rebellion. The third section of this act is inconsistent with section 8 of the act of July 28, 1866, and to the extent of the inconsistency repeals it.

After July 27, 1868, it was not possible for owners of property seized under the captured and abandoned property act to obtain reimbursement through a circuitous action against the seizing officer.

As the judgment of the circuit court of South Carolina decided that Callicott was not acting under the authority or color of the captured and abandoned property act, the Assistant Secretary erred in directing payment from the appropriation for the return of proceeds of captured and abandoned property.

And it is further to be noticed that the appropriation for the return of proceeds of captured and abandoned property is that contained in section 3689 of the Revised Statutes, to wit:

> For the return of proceeds from the sale of captured and abandoned property in insurrectionary districts, to the owners thereof, who may to the satisfaction of the Court of Claims prove their right to and ownership of said property. Approved June 22, 1874

And we do not find any other appropriation, vital in 1874 or now, for the return of said proceeds.

In fact the proceeds of this cotton belonged to a fund distinct from the proceeds of captured and abandoned property and was so treated by Congress in the act of May 18, 1872. (The executive regulation of June 27, 1865, which distinguishes property taken before from that taken after June 30, 1865, is found in the appendix to this brief.)

The fund and the appropriation to which McLeod should have turned is the one designated in that act, but here again he is limited to actual proceeds.

Should the court, therefore, be of opinion that the mandamus ought to issue, the court should indicate the appropriation act providing for its payment, and direct the Secretary to which appropriation it is to be charged, leaving to him the ascertainment of the sufficiency of the appropriation.

We think it clear that there is a discretion in the pres-

ent Secretary of the Treasury to decide which, if any, appropriation is available for payment of the $4,279.94 claimed, and that he is not bound by the views of Assistant Secretary Hartley; and the complications of the statutes make this discretion a grave one.

Instead of reviewing the several decisions of this court on the question of mandamus, the cases of Gaines *vs.* Thompson (7 Wallace, 347), and The Secretary *vs.* McGarrahan (9 Wallace, 298), are cited.

Another aspect of the case presents itself, if we consider that these acts were passed not for the benefit of the plaintiffs, but for the indemnification and protection of defendants.

Section 12 of the act of March 3, 1863, seems to fix a time for filing the certificate of probable cause, by providing that no execution shall thereafter issue against the collector, &c.

And it must be borne in mind that this mandamus is invoked not by Callicott to protect himself from McLeod, but by McLeod. By his replication McLeod (p. 19, Record) denied that Callicott was acting under color of authority, and tendered an issue that the act was Callicott's own wrong. Having obtained a judgment on this issue, he takes out a *fieri facias;* but after the 17th February, 1871, the date of the dismissal of the writ of error, he seems to have found no property of Callicott's from which he could realize his claim, and in 1874 he seeks to impose on the United States his hitherto fruitless judgment, by asking the court to certify in effect that Callicott had been acting under color of authority and had committed the grievances not of his own wrong.

Now, the certificate of probable cause, which forms the

kernel of this case, was not a judgment in any sense of the term; it was an *ex-parte* proceeding. It would seem eminently proper, before the United States should be made responsible for the personal debt of its officer, that they should have a day in court; and as this has not been given, it is for this court (even if not for the officers of the Treasury Department) to inquire into its formalities and its justice before ordering the custodians of the public funds, under pain of contempt, to regard it.

The charge to the jury was delivered by Chief Justice Chase, the bill of exceptions was sealed by him, and it was he who considered the motion for a new trial. Certainly his contemporaneous views are entitled to weight in considering whether there was probable cause. After reviewing the evidence offered by plaintiff he says (Chase's Decisions, p. 452): "The jury might possibly have inferred, from all these things, that Callicott was not acting in good faith. We cannot say that the conclusion was wrong."

We contend that the certificate of probable cause was inconsistent with the judgment on the pleadings. It is manifest that it would not have been granted by the Chief Justice, nor do we think Judge Bryan would have done so, if the question had come up for argument after proper notice to the United States.

Whether the certificate of probable cause should be granted is a matter of discretion, but this discretion is judicial; and if, upon the fact appearing of record, it is seen that no such certificate should have been given, this court would not in any event issue a mandamus founded thereon.

But, beyond all this, we contend that an application for certificate from the plaintiff should not have been entertained for one moment. Nor do we see how

McLeod, after electing to pursue Callicott, after losing a remedy in the Court of Claims, and failing to apply to the Secretary of the Treasury under the act of May 18, 1872, was entitled to any consideration at the hands of Judge Bryan five years after the rendition of judgment and three years after the dismissal of the writ of error in this court.

Assuming, however, that the certificate of probable cause was rightly made and that the court can review the decision of the Comptroller in the matter of interest in this proceeding, that decision, we maintain, was right. The plaintiff had for several years pursued the original defendant alone as a trespasser on his property. He had not sought to put the United States in any position in which they could be held responsible, directly or indirectly, for the judgment againt Callicott. There was no delay, even if upon the rendition of the certificate it was the duty of the Secretary of the Treasury to have paid the judgment, except for the time which intervened between the date of that certificate and that of payment, for which he has received interest. In conclusion, it is submitted, upon the whole, that even if the officers of the Treasury have erred in judgment they have done so only in matters reposed by the law on their judgment, and that to grant a mandamus in this case would be only to initiate a system of managing the Treasury and the executive departments by a series of minute judicial orders affecting these departments in all their details. This proposition would be too obviously at variance with our whole system of government, as well as impracticable, to require discussion.

CHARLES DEVENS,
Attorney-General.
JOHN S. BLAIR.

APPENDIX

[Page 632, Vol. IV, Stat. II, act March 2, 1833, Chap. LVII.]

SEC. 2. *And be it further enacted*, That the jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law; and if any person shall receive any injury to his person or property for or on account of any act by him done, under any law of the United States, for the protection of the revenue, or the collection of duties on imports, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States in the district wherein the party doing the injury may reside, or shall be found. And all property taken or detained by any officer or other person under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. And if any person shall dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained as aforesaid, or shall aid or assist therein, such person shall be deemed guilty of a misdemeanor, and shall be liable to such punishment as is provided by the twenty-second section of the act for the punishment of certain crimes against the United States, approved the thirtieth day of April, anno Domini one thousand seven hundred and ninety, for the wilful obstruction or resistance of officers in the service of process.

SEC. 3. *And be it further enacted*, That in any case where suit or prosecution shall be commenced in a court of any State, against any officer of the United States, or

other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person, under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States, in and for the district in which the defendant shall have been served with process, setting forth the nature of said suit or prosecution, and verifying the said petition by affidavit, together with a certificate signed by an attorney or counsellor at law of some court of record of the State in which such suit shall have been commenced, or of the United States, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true; which petition, affidavit, and certificate, shall be presented to the said circuit court, if in session, and if not, to the clerk thereof at his office, and shall be filed in said office, and the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of *certiorari* to the State court, requiring said court to send to the said circuit court the record and proceedings in said cause; or if it were commenced by *capias*, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which said writ shall be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or some person duly authorized thereto; and thereupon it shall be the duty of the said State court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the State court shall be wholly null and void.

And if the defendant in any such suit be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the said cause according to the rules of law and the order of the circuit court, or of any judge thereof, in vacation. And all attachments made and all bail and other security given upon such suit, or prosecution, shall be and continue in like force and effect, as if the same suit or prosecution had proceeded to final judgment and execution in the State court.

And if, upon the removal of any such suit, or prosecution, it shall be made to appear to the said circuit court that no copy of the record and proceedings therein, in the State court, can be obtained, it shall be lawful for said circuit court to allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court; and on failure of so proceeding, judgment of *non pros.* may be rendered against the plaintiff with costs for the defendant.

SEC. 4. *And be it further enacted*, That in any case in which any party is, or may be by law, entitled to copies of the record and proceedings in any suit or prosecution in any State court, to be used in any court of the United States, if the clerk of said State court shall, upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceedings, the court of the United States in which such record and proceedings may be needed, on proof, by affidavit, that the clerk of such State court has refused or neglected to deliver copies thereof, on demand as aforesaid, may direct and allow such record to be supplied by affidavit, or otherwise, as the circumstances of the case may require and allow; and, thereupon, such proceeding, trial, and judgment, may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

[Page 741, Vol. XII, Chap. LXXVI, act March 3, 1863.]

SEC. 12. *And be it further enacted*, That in all suits or proceedings against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officer and by him paid into the Treasury of the United States, in the performance of his official duty, in which any district or other attorney shall be directed to appear on behalf of such officer by the Secretary or Solicitor of the Treasury, or by any other proper officer of the government, such attorney shall be allowed such compensation for his services therein as shall be certified by the court in which such suit or proceedings shall be had, to be reasonable and proper, and approved by the Secretary of the Treasury; and where a recovery shall be had in any such suit or proceedings, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

[Page 329, Vol. XIV, Chap. CCXCVIII, act July 28, 1866.]

SEC. 8. *And be it further enacted*, That the provisions of the second, third, and fourth sections of the act approved March second, eighteen hundred and thirty-three, entitled "An act further to provide for the collection of duties on imports," and of the twelfth section of the act approved March third, eighteen hundred and sixty-three, entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes," shall be taken and deemed as extending to and embracing all cases arising or which may have heretofore arisen, and all suits and prosecutions heretofore brought and now pending, or which may hereafter be brought against any officer of the United States

or other person by reason of any acts done or proceedings had by such officer or other person, under authority or color of the act approved March twelve, eighteen hundred and sixty-three, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," or the act approved July two, eighteen hundred and sixty-four, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection": *Provided*, That such acts done or proceedings had under the two acts last aforesaid, or under color thereof, shall have been done and had under the authority or by the direction of the executive government of the United States: *And provided further*, That when a recovery shall have been, or shall hereafter be, had in any such suit or prosecution brought, or which may hereafter be brought, as aforesaid, the payment of the amount recovered, as provided for in the said twelfth section of the act approved March third, eighteen hundred and sixty-three, aforesaid, shall be made out of the moneys arising and obtained from the proceeds of sales and leases and fees collected and paid over to the government under the two acts approved March twelve, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four. aforesaid, in relation to captured and abandoned property.

[Page 243, Vol. XV, Chap. CCLXXVI, act July 27, 1868.]

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the provisions of section eight of the act of July twenty-eight, eighteen hundred and sixty-six, entitled "An act to protect the revenue, and for other purposes," and the forms and modes by that section and the twelfth section of the act of March three, eighteen hundred and sixty-three, therein referred to, prescribed for prosecuting suits, withholding executions, and pay-

ing judgments against officers of the United States, or other persons engaged in executing the acts relative to captured and abandoned property, shall extend and be applied to all suits and proceedings (except those in behalf of the United States) which have been brought, or may hereafter be brought, against any officer or agent of the government, civil or military, for acts done during the rebellion while acting by virtue or under color of his office or employment; and every defendant in such suit or proceeding having made full defence thereto, and having notified the Attorney-General of the United States to appear and defend the same, shall be entitled to the full benefit and protection provided in said section for officers and agents of the government engaged in the collection of the public revenue; and any defendant being aggrieved by any order or direction, certificate, ruling, or judgment of any court made or had in any such proceeding may except to, and appeal therefrom to the Supreme Court of the United States, and have the questions arising there heard and determined.

SEC. 3. *And be it further enacted*, That it is hereby declared to have been the true intent and meaning of the act approved March twelfth, eighteen hundred and sixty-three, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," that the remedy given in cases of seizure made under said act, by preferring claim in the Court of Claims, should be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said act from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said Court of Claims; and in all cases in which suits of trespass, replevin, detinue, or any other form of action may have been brought and are now pending, or shall hereafter be brought against any person for or on account of private property taken by such person as an officer or agent of the United States, in virtue or under

color of the act aforesaid, or the act approved July second, eighteen hundred and sixty-four, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," the defendant may and shall plead or allege in bar thereof, that such act was done or omitted to be done by him as an officer or agent of the United States in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof, and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be a complete and conclusive bar to any such suit or action: *Provided, however*, That no judgment, recovered in accordance with this act, shall be paid by the United States unless the amount received by the defendant as the proceeds of the transaction, which was the foundation of the suit, shall have been paid into the Treasury, except upon an appropriation duly made therefor after a full examination of the claim upon its merits.

[Page 134, Vol. XVII, Chap. CLXXII, act May 18, 1872.]

SEC. 5. That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the lawful owners, or their legal representatives, of all cotton seized after the thirtieth day of June, eighteen hundred and sixty-five, by the agents of the government unlawfully, and in violation of their instructions, the net proceeds, without interest, of the sales of said cotton actually paid into the Treasury of the United States: *Provided*, That the receipt thereof shall be taken and received in full satisfaction of all claims against the United States for or on account of the seizure of said cotton; and a sufficient sum for such payment is hereby appropriated out of any money in the Treasury not otherwise appropriated: *And provided further*, That the foregoing provisions shall not apply to any claim now pending before the Court of Claims, nor to any claim not filed in the Treasury Department within six months after the passage

of this act; and the sum of twenty thousand dollars is hereby appropriated for the payment of the necessary expenses of defending the United States in respect to claims for said proceeds, to be expended under the direction of the Secretary of the Treasury.

CIRCULAR LETTER OF INSTRUCTIONS, ETC., RELATIVE TO CAPTURED AND ABANDONED PROPERTY, ETC.

TREASURY DEPARTMENT,
June 27, 1865.

The various rules and regulations heretofore prescribed by the Secretary of the Treasury in regard to the above-named subjects having been rendered nugatory in whole or in part by the changed condition of affairs in the Southern States and executive orders and proclamations, and the War Department having assumed charge of freedmen, abandoned lands, &c., under the provisions of the act of Congress approved March 3, 1865, the following instructions as to the duties of officers of the Treasury Department in the premises are prescribed, and will be regarded as in full force and effect immediately on the receipt thereof by any officer whose action is in anywise affected thereby:

1. All restrictions on commercial intercourse in and with States and parts of States heretofore declared in insurrection, and on the purchase, transportation, and sale of the products thereof, are removed, *except* as to the transportation thereto or therein of arms, ammunition, articles from which ammunition is made, gray uniforms, and gray cloth; and *except, also*, those relating to property heretofore purchased by the agents or captured by or surrendered to the military forces of the United States. Nor will any fees or taxes be charged or collected except those imposed by the customs and internal-revenue laws. And the supervision necessary to prevent the shipment of the prohibited articles will be exercised only by the regular and ordinary officers of

the customs, acting under the revenue laws of the United States.

2. Subordinate officers discharging duties in regard to commercial intercourse, under the regulations referred to, will consider their official connection with this department as terminating with the 30th instant, without further notice.

3. Agents for the purchase of products of insurrectionary States on government account will close their official business, east of the Mississippi, with the transactions of the 13th instant; and west of it, with the transactions of the 24th instant; returning to sellers all property or money received or collected since those dates, respectively, and using such dispatch in the premises that their connection with the department may, if possible, terminate with the 30th instant.

4. Officers of this department charged with the duty of receiving and collecting, or having in their possession or under their control captured, abandoned, or confiscable personal property, will dispose of the same, in accordance with regulations on the subject heretofore prescribed, at the earliest time consistent with the public interests, and will refrain from receiving such from military or naval authorities after the 30th instant. This will not be construed, however, as interfering with the operations of the agents *now* engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records, &c., delivered to the United States military or Treasury authorities by rebel military officers or cotton-agents. Those so acting will continue to discharge the duties thus imposed until such property is all received or satisfactorily accounted for, and until the amount so secured is shipped or otherwise disposed of under the regulations on the subject heretofore prescribed. And they will use all the means at their command, with the utmost vigor, to the end that all the property so collected, captured, or turned over shall be secured to the United States with the least possible cost and delay.

After the 30th instant, the duty of receiving captured and abandoned property, not embraced in the above exception, will be discharged by the usual and regular officers of the customs, at the several places where they may be located, in accordance with regulations relating to the subject, and officers heretofore performing that duty will give them all the aid and information in their power to enable them to carry out the same.

5. Officers of this department charged with the care or supervision of, or having in their possession or under their control, any abandoned or confiscable lands, houses, and tenements, will turn them over to a duly authorized officer of the Bureau of Refugees, Freedmen, and Abandoned Lands, so far as they may be required or demanded by the same, together with all moneys, books, records, and papers arising from or relating to the property so turned over, taking proper receipts or vouchers therefor. This rule will also govern the action of all agents of this department connected in any way with the care of freedmen, &c., so far as it may be applicable. And all persons asking for any information in regard to the property so turned over, or for the release of the same, or for the release of any proceeds or moneys arising therefrom, will be referred to the Commissioner of Refugees, Freedmen, and Abandoned Lands, at Washington, to whom communications on the subject should be addressed.

6. Officers of this department having in their possession or under their control any moneys whatever arising from fees collected under the commercial intercourse regulations (except those collected for the benefit of freedmen, which will be disposed of under section 5), or from the sales of captured, abandoned, or confiscable personal property, will forthwith deposit the same with the nearest assistant treasurer, designated depositary, or deposit bank (keeping the amounts from the different sources separate), to the credit of H. A. Risley, esq., supervising special agent, &c., taking therefor receipts in quadruplicate—which receipts must show whence the sums were received—one of which will be retained by the officer so depositing, one forthwith sent to the Sec-

retary of the Treasury, one to the Commissioner of Customs, and one to Mr. Risley, at Washington.

7. All officers above referred to, except proper officers of the customs, acting exclusively under the revenue laws, will, after they have closed their official business, as above directed, and sold at auction, to the highest bidder, the furniture and property remaining on hand, and accounted for the proceeds of the same, forthwith systematically arrange the books, records, papers, &c., of their late office, that they may easily be referred to and examined, pack them in secure and water-proof boxes, and forward the same, so marked as to indicate their contents, together with their respective resignations, addressed to the Secretary of the Treasury, Washington City.

HUGH McCULLOCH,
Secretary of the Treasury.

O

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 843.

UNITED STATES, *ex relatione*

ALEXANDER McLEOD,

vs.

JOHN SHERMAN, SECRETARY OF THE TREASURY.

Error to the Supreme Court of the District of Columbia.

Brief in Reply on the part of Relator.

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Supreme Court of the United States.

OCTOBER TERM, 1878.

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It is said that *mandamus* will not lie against the Secretary of the Treasury, because he is only one of the several officers of that Department, whose conjoint action is necessary before money can be paid out of the Treasury.

This point has the merit of *novelty*, for we are not aware that it has ever before been raised in this court. If the point is well taken, it is remarkable that it was not even referred to in *United States* vs. *Guthrie* (17 How., 284), for it would have afforded a conclusive answer to the relator's case.

In that case this court refer to the provision of law inhibiting the Secretary of the Treasury "*from directing the payment of moneys not specifically appropriated by law*," thereby conceding that the Secretary has power to direct payments which are authorized by law.

It is conceived that the division and distribution by law of the duties of the Treasury Department among a number of officers does not necessarily remove those officers from the control of the Secretary who is the head of the Department. The law says there shall be a Department of the Treasury and "a Secretary of the Treasury, *who shall be the head* thereof" (R. S., § 233). Now what is to be understood by "head?" Does it mean an officer in chief who shall have that authority over his subordinate officers which is indispensable to give unity, completeness, and efficiency to his Department, or does it mean an officer who shall be a mere *figure-head*—that is, such an officer as is described in the brief of the respondent—an officer who is powerless to compel his subordinates to perform the duties assigned to them by law?

The law (R. S., § 191,) removing from the control or revision of the Secretary of the Treasury all balances which shall be certified to the heads of departments by the Commissioner of Customs or the Comptrollers of the Treasury upon the settlement of public amounts is strongly in corroboration of the view above taken. *Exceptio probat regulam.*

Added to all this, no money can be paid out of the Treasury except on a warrant signed by the Secretary or another duly authorized by him.

In 1849 it was submitted to Mr. Attorney-General

Johnson to say whether the decision of the head of a department directing the payment of a particular claim was binding upon all the subordinate officers by whom the same was to be audited and passed. His opinion was that such decision of the head of a department was binding on such subordinate officers, that such had been the practice from the origin of the Government, and that it was absolutely necessary to the proper operation of the Government that it should be so. (5 Opinions, 87.) See also the opinion of Mr. Attorney-General Crittenden to the same effect. (5 Opinions, 657.)

We forbear to submit any reply as to what is said in the brief of respondent as to the alleged error of the department in recognizing the obligation of the Government to pay anything at all on the judgment against Callicott. As we have shown in the original brief, the decision of the department in that matter is not open to review by this court or the department itself. By the settled practice of all the executive departments, recognized by this court in 15 Peters, 400, *United States* vs. *Bank of Metropolis*, such a decision is final. See 9 Opinions, 101, and 13 Opinions, 388, where many precedents are referred to.

It is submitted that the view taken by the learned counsel for the respondent as to the effect of the 3d section of the act of the 27th July, 1868, on the 8th section of the act of 28th July, 1856, namely, that the former operated as a repeal of the latter, is not maintainable.

The legislative declaration in the 3d section of the act of July, 1868, as to the exclusiveness of the rem-

edy by suit in the Court of Claims, is merely introductory and explanatory of *the real purpose of the section*, which was to authorize and make it the duty of officers and agents sued for acts done by virtue or under color of the captured and abandoned property acts, to plead to that effect in bar of the action, and so compel the plaintiff to seek redress in the Court of Claims. It was not, however, the intention of Congress, if, indeed, such a thing were possible, to prevent the bringing of suits of the kind mentioned, but only to provide a plea in bar to defeat and frustrate such suits when brought.

But suppose the defendant in any such suit should by some mischance fail to plead in bar as directed by the 3d section of the act of July, 1868, would not the suit proceed regularly to judgment as in ordinary cases? Clearly there is nothing in the section referred to to arrest its progress; nor is there anything in that section which would deprive the defendant in such a case of the promised indemnity, in case the court should certify in the way prescribed by the act.

Now, so far from the act of July, 1868, repealing the 8th section of the act of July, 1866, it expressly extends the operation of that section to a new class of cases. It is not pretended that there are any express words of repeal in the 3d section of the act of July, 1868, and we do not comprehend how it can be made out that there is a repeal by implication.

We cannot understand how the counsel for the defendant in error could suppose that the case of *McLeod* vs. *Callicott* came within the class of cases mentioned in the 3d section of the act of July, 1868; for

certainly the verdict of the jury on the issue joined under Callicott's plea in bar conclusively settled that the case did not come within that section.

We are equally surprised to find that the learned counsel constantly treat the certificate made by Judge BRYAN as a certificate of "*probable cause.*" That there was no room for any such certificate after the verdict on the issue under the special plea, we freely concede, and we think it very clear that Judge BRYAN did not certify anything which does not well stand with the verdict of the jury. All that the judge says in his certificate about probable cause is in connection with and inferential from what he certifies as to the defendant, Callicott, having acted under orders from the Secretary of the Treasury. In dealing with this part of the case the learned counsel seem to overlook the very important fact that the 8th section of the act of July, 1866, provides for *two distinct* kinds of certificates, one where the officer acted with probable cause, and the other where he acted *under the orders of the Executive Department of the Government.* Now the certificate given by Judge BRYAN was *of the latter sort*, namely, that Callicott had acted under the orders of the Secretary of the Treasury. It has nothing to do with *probable cause*, and refers to a state of things *wholly outside* the 3d section of the act of July, 1868. But, as the certificate is pursuant to the the 8th section of the act of July, 1866, it is as valid and operative as though the act of July, 1868, had never been passed.

This view, which is the view that was presented in the argument below, relieves the case of all incon-

sistency, and affords a complete answer to the suggestion that Chief-Justice CHASE would have refused to make the certificate. For him to have refused to certify what was admitted and indisputably proved, namely, that Callicott converted the cotton under orders from the Secretary of the Treasury, was quite impossible.

The correction of this evident misapprehension as to the true character of the certificate made by Judge BRYAN seems to dispose of a large part of the argument on the other side.

The endeavor of counsel to wrest the *proviso* of the 3d section of July, 1868, from its true meaning and make it apply to cases outside that act cannot succeed. The words of that proviso too plainly limit its operation to the case named in the first section of the act. The contention that Congress could not have intended that any recovery under the act should be satisfied from the proceeds of captured and abandoned property does not seem very reasonable. We see nothing remarkable in Congress indemnifying citizens aggrieved by the illegal proceedings of officials during the war from the spoils of the war. On the contrary, it seems to us a very proper application of money so derived. But, we shall say nothing more on this head because it is clear that the 3d section of the act of July, 1868, including the *proviso*, has no bearing on a case like that of *McLeod* vs. *Callicott*.

We call attention to the fact that, inasmuch as the legislation which has a bearing on this case is not "general and permanent" in its nature, it is not to be found in the Revised Statutes (See R. S., § 5595);

and, furthermore, that all the proceedings in *McLeod* vs. *Callicott*, including the certificate, took place before the Revised Statutes were approved by the President.

The statement in the brief of the defendant in error, that Judge BRYAN "does not appear by the record to have participated in the trial" (Brief, p. 8), will be found to be erroneous on reference to page 19 of the record.

The statement in the opposite brief that the sum of $4,279.94, claimed in this suit, represents interest on the judgment against Callicott, is an error. The sum mentioned represents *principal money*, and bears interest itself from the 9th of November, 1874. See the statement in plaintiff's brief (p. 4), which is made exactly in accordance with the rule laid down by this court in the case of *Story* vs. *Livingston* (13 Peters, 359).

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